No. 98-1170-CFH Title: Leonard Portuondo, Superintendent, Fishkill Correctional Facility, Petitioner
v.
Ray Agard

Docketed:
January 22, 1999 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Jan 20 1999	Petition for writ of certiorari filed. (Response due February 21, 1999)
	Feb 8 1999	Brief of respondent Ray Agard in opposition filed.
	Feb 8 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Feb 24 1999	DISTRIBUTED. March 19, 1999
	Mar 22 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Mar 22 1999	Petition GRANTED. SET FOR ARGUMENT November 1, 1999. **********
	Apr 13 1999	Order extending time to file brief of petitioner on the merits until June 7, 1999.
	Apr 13 1999	Order extending time to file joint appendix until June, 7, 1999.
	Jun 4 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jun 7 1999	Joint appendix filed.
	Jun 7 1999	Brief of petitioner Leonard Portuondo filed.
	Jun 7 1999	Brief amicus curiae of New York State District Attorneys Association filed.
	Jun 7 1999	Brief amicus curiae of United States filed.
	Jun 17 1999	Order extending time to file respondent's brief on the merits to and including August 9, 1999.
	Jul 30 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 9 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 9 1999	Brief of respondent Ray Agard filed.
	Aug 19 1999	Application (99A166) to extend the time to file a reply brief from September 9, 1999 to September 23, 1999, submitted to Justice Ginsburg.
	Aug 23 1999	Application (99A166) granted by Justice Ginsburg extending the time to file until September 23, 1999.
	Sep 10 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 13 1999	Motion of respondent for appointment of counsel filed.
	Sep 13 1999	Record filed.
	Sep 21 1999	CIRCULATED.
	Sep 24 1999	Reply brief of petitioner Leonard Portuondo, Superintendent filed.
	Oct 4 1999	DISTRIBUTED. October 8, 1999 (Page 29)
	Oct 12 1999	Motion for appointment of counsel GRANTED and it is

No. 98-1170-CFH

Entry	Date	Proceedings and Orders
		ordered that Beverly Van Ness, Esq., of New York, New York, is appointed to serve as counsel for the respondent in this case.
	Nov 1 1999	ARGUED.

No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 20, 1999

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in extending this Court's decision in Griffin v. California , 380 U.S. 609 (1965) -- which prohibited a prosecutor's comment on a defendant's right to remain silent -- to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses?

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NO. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner Leonard Portuondo, Superintendent of the Fishkill Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on October 23, 1998, directing the district court to grant the petition for a writ of habeas corpus unless the state affords defendant a retrial within sixty days from the date of the mandate. The petitioner is represented in this proceeding

by the District Attorney of Queens County, New York, by agreement with the Attorney General of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 117 F.3d 696 (Oakes, J; Winter, J., concurring; Van Graafeiland, J., dissenting), and is reprinted in the appendix to this petition at p. 70a, infra. The order of the Court of Appeals for the Second Circuit denying rehearing or rehearing en banc is reprinted in the appendix at p. 79a, infra.

The memorandum decision of the United States District Court for the Southern District of New York (Raggi, J.) has not been reported. It was delivered orally by the court and transcribed in minutes dated March 15, 1996. The opinion, as transcribed, is reprinted in the appendix at p. 1a, infra, and the order and judgment of the court are reprinted at pp. 10a and 79a, respectively.

JURISDICTION

This petition for a writ of habeas corpus was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On March 15, 1996, the Eastern District denied the petition for a writ of habeas corpus. Pet. App. at 1a, 10a, 79a.

On July 3, 1997, the Second Circuit entered a judgment and an opinion reversing that decision and remanding the case to the district court, with directions to grant the petition. Pet. App. at 12a.

On October 23, 1998, the Court of Appeals for the Second Circuit denied that petition for rehearing and petition for rehearing en banc. Pet. App. at 70a.

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Second Circuit Court of Appeals held that the prosecutor's remark was prohibited by both the Fifth and Sixth Amendments.

The Fifth and Sixth Amendment to the Constitution of the United States provide respectively, in pertinent part:

Amendment V - Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI - Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and casue of the accusation; to be confronted with the witnesses against him; to have compulstory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

At trial, Nessa Winder described her first meeting with defendant at a nightclub, which culminated in a consensual sexual encounter. During the week that followed, defendant and Winder agreed to meet again at the nightclub. Winder and a friend went to the club and met defendant. The last thing that Winder recalled that evening was defendant's friend arriving at the club, and she could remember nothing else between that time and when she awoke in defendant's apartment the following morning.[1]

When Winder awoke the next morning, she was wearing only a vest, and defendant was lying next to her wearing only his underwear. After Winder refused defendant's request for sex, defendant hit and kicked her. He then forced her to commit sodomy, and other sex acts. Winder eventually escaped, contacted the police, and received medical treatment for her injuries.

The following day, defendant left a telephone message for Winder on her answering machine and apologized for being a "golden asshole" and for the "entire situation." He wished that Winder would "live safefully [sic] and peacefully." As a result of a search warrant executed at defendant's home, the police recovered a .45 caliber automatic handgun, holster, and two magazines containing shells. Defendant was arrested, and eventually admitted that he had a gun, but claimed that he was

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1. Both women returned to defendant's apartment, where he threatened Winder's friend with a gun.

holding it for a friend. He also acknowledged that he had been involved in a fight with Winder and that, during that fight, she scratched him and he "mushed" her face. He admitted that they had had sex, but claimed it was consensual.

Among the witnesses called for the defense, defendant testified on his own behalf. He stated that he and Winder had met the week prior to the sexual encounter at issue, that the two had engaged in consensual vaginal intercourse, oral sodomy, and anal intercourse. Defendant admitted that on the morning in question, May 6, 1990, he engaged in vaginal intercourse and oral sex with Winder, but denied that they had engaged in any anal intercourse. Defendant stated that it was entirely consensual. He also admitted that he called Winder the next day to apologize, but claimed that he was only apologizing for "mush[ing]" her face.

Defense counsel, in his summation, argued vigorously that the prosecution's witnesses had fabricated the allegations against defendant, and that defendant's testimony was more credible than the testimony of the prosecution's witnesses. He asked the jury to compare the victim's testimony with defendant's testimony, and to "consider the reasonableness of the two different stories." Defense counsel also argued that defendant's description of the events on the day of the crime, was a "more reasonable and natural extension of the relationship that started the weekend before," and described defendant's testimony as "consistent."

In response, the prosecutor argued that Winder had been victimized by defendant even though defendant wanted the jury to think that he was the victim. She asked the jury to consider that defendant, rather than the victim, was the person who had been less than straightforward because he was an interested

witness. Further, the prosecutor pointed to the fact that defendant had had the opportunity to hear all of the testimony in the case before he testified. She stated that "unlike all the other witnesses . . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony all the other witnesses before he testifies." The prosecutor continued, "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say [sic]? How am I going to fit it into the evidence?" She concluded that defendant was a "smart man. I never said that he was stupid. . . . He used everything to his advantage."

State Court Proceedings

On direct appeal to the Supreme Court of the State of New York, Appellate Division, defendant argued, among other things, that his right to a fair trial was abridged due to the prosecutor's summation comment regarding defendant's advantage in hearing other witnesses before he testified.

On December 20, 1993, the Appellate Division modified the judgment of conviction by reversing one conviction of third-degree weapon possession and dismissing that count of the indictment, and, as modified, unanimously affirmed the judgment. People v. Agard, 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993).

On February 1, 1994, defendant sought leave to appeal to the New York Court of Appeals. In his leave application, defendant argued the same claims that he had raised in the Appellate Division. On April 14, 1994, defendant's application for leave to appeal to the New York Court of Appeals was

denied. People v. Agard, 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994).

Federal Court Proceedings

In his June, 1995, petition for a writ of habeas corpus, among defendant's claims, he argued that the prosecutor, in her summation, improperly infringed his right to be present at trial and to confront his accusers by noting that he had had the opportunity to hear all of the testimony before he testified in his own behalf.

In a decision dated March 15, 1996, the District Court denied the petition (Raggi, U.S.D.J.). As a preliminary matter, the court noted that this case had presented a question of credibility for the jury and that "there is no question in my mind that this court could not hope on a cold record, to make credibility determinations between [the defendant and the complainant]. That is not my task in any event" (Decision: 15; Pet. App. at 2a). It later continued,

> when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a wholesale verdict; it wrestled with this.

(Decision: 15) Pet. App. at 2a-3a. The Court then ruled on defendant's claims. Among its specific findings, the District Court rejected defendant's claim that the prosecutor's summation infringed on defendant's right to be present and confront his accusers under the Sixth and Fourteenth

Amendments. Whether or not the statement was erroneous, the Court ruled that "I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from [the prosecutor's] remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind . . . that there was any prejudice here or that I have any concern that this may have swayed the verdict" (Decision: 22) Pet. App. at 9a.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ unless the state afforded defendant a new trial within sixty days from the date of the mandate. Among its findings, the Court of Appeals held that the prosecutor's summation remark violated defendant's Fifth and Sixth Amendment rights, and also constituted harmful error. See Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997); Pet. App. at 12a.

The court ruled that the prosecutor's summation remark, that insinuated to the jury for the first time on summation that a defendant's presence in the courtroom gave him a unique opportunity to tailor his testimony to match the evidence, violated a criminal defendant's constitutional rights to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.

Upon denying the petition for rehearing Agard v. Portuondo, 159 F.3d 98 (2d Cir. 1998) (Pet. App. at 70a), the court narrowed the rationale of its earlier ruling. The court stated that it retreated from any language in the prior decision that suggested that it was constitutional error for a prosecutor to elicit facts tending to show that a defendant tailored his testimony, or to comment on that factual showing. But the

court also ruled that a prosecutor could not comment on defendant's presence in the courtroom, or the concomitant opportunity to hear the testimony of other witnesses without such an additional factual showing demonstrates that defendant tailored his testimony. Because the prosecutor in this case ran afoul of this prohibition on commenting on defendant's presence and opportunity to hear other witnesses, the court adhered to its prior reversal of the district court decision.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Second Circuit's decision prohibiting comment on a defendant's presence in the courtroom warrants review for several reasons. First, the decision creates an unwarranted extension of this Court's decision in Griffin v. California, 380 U.S. 609 (1965), thereby creating a rule that this Court has never considered and one that was never remotely contemplated by the Griffin Court. In Griffin, the Court ruled that a prosecutor's comment on a defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. But Griffin only addressed the propriety of comments on the right to remain silent; it did not stand for the proposition that any comment concerning the exercise of any constitutional right was a constitutional error. Furthermore, this Court has held that Griffin should be interpreted narrowly, an admonition that the Second Circuit entirely failed to heed. Because the Second Circuit's prohibition was contrary to this Court's decisions, and because it presents an issue never before considered by this Court, it is worthy of this Court's review.

Second, the issue in this case has for some time generated a split of authority among the courts that requires this Court's intervention. Courts nationwide have been at odds for many years over whether and when a prosecutor may appropriately comment on a defendant's presence or behavior in the courtroom. This case presents the Court with the opportunity to resolve this dispute.

Third, the Second Circuit's ruling could potentially affect any criminal trial in any jurisdiction in which a defendant testifies. These far-reaching effects demonstrate the need to review an issue of such national importance. Indeed, because of the importance of the case, the Second Circuit's ruling in this very case has already generated a substantial, national controversy. It has engendered a plethora of articles and decisions that directly debate the validity and significance of the Second Circuit's finding of constitutional error.

I. The Second Circuit Improperly Extended Griffin v. California, 380 U.S. 609 (1965), To Prohibit Comment on a Defendant's Presence in the Courtroom, Despite this Court's Admonitions That Griffin Should be Interpreted Narrowly and In Accordance with Its Facts.

The Agard court's conclusion that the Fifth and Sixth Amendment prohibited a prosecutor's remark on the defendant's presence in the courtroom was an unwarranted extension of Griffin v. California, 380 U.S. 609 (1965). The Griffin decision prohibited a prosecutor from commenting on a defendant's failure to testify, but the Second Circuit applied it to an entirely different constitutional right, apparently on the theory that a prosecutor's comment on any constitutional right is in itself constitutional error, at least without some specific factual

showing that could independently establish that testimony had been falsified. This extension was never contemplated by the Griffin Court nor is it supported by the reasoning of Griffin.

Griffin's ruling was limited to a defendant's Fifth Amendment right to remain silent. In Griffin, the Court considered whether a prosecutor's comment on a defendant's failure to testify, and a court's charge that the jury could draw a negative inference from a defendant's failure to testify, violated his Fifth Amendment rights. The prosecutor in Griffin reviewed the facts supporting the murder, and then rhetorically asked what kind of man would commit those acts. The prosecutor continued that the defendant would know that, but that he had "not seen fit to take the stand and deny or explain . . . and in the whole world, if anybody would know, this defendant would know." Griffin, 380 U.S. at 611. The prosecutor then concluded that because the victim was dead, she could not tell the jury her side of the story and that "[t]he defendant won't." Id.

In Agard, the Court used Griffin "by analogy" to find that a prosecutor's comment on the presence of a defendant in the courtroom and the defendant's opportunity to hear other witnesses, was improper. But Griffin only "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Indeed, even the Second Circuit acknowledged that Griffin did not explicitly prohibit the prosecutor's remarks. For example, in its initial decision and the petition for rehearing, the Second Circuit relied on Griffin by holding that the prosecutor's remarks were "analogous" to those prohibited in Griffin (Agard, 117 F.3d at 709, Pet. App. at 42a), and, in its second decision, stated only that the issue was "somewhat similar to that in Griffin" (Agard,

159 F.3d at 99, Pet. App. at 73a). Thus, the Agard panel's determination used Griffin to create a rule that this case never contemplated.

More importantly, as at least one commentator has noted, the Second Circuit's decision in Agard is contrary to the rationale supporting Griffin. "A significant danger of permitting comment on the exercise of the self-incrimination is that the jury will draw improper inferences; there is a great risk that they will believe the accused has not testified because he is guilty, rather than because of any of the other reasons he might choose to remain silent." Michael Martin, The Tailoring of Testimony, N.Y.L.J., October 10, 1997, at p. 3. By contrast, it is unlikely that a jury would infer a defendant's guilt merely through his attendance at trial. "While a juror in a Griffin situation might think that `he would have testified if he didn't have something to hide,' it seems unlikely that a juror . . . would say to herself, if he were innocent, he wouldn't have attended the trial before testifying." Id. Thus, the reasoning of Griffin simply does not support the finding of error here.

Moreover, using Griffin to find a constitutional violation by analogy is contrary to subsequent decisions that encourage a narrow rather than a broad application of the Griffin holding. In United States v. Robinson, 485 U.S. 25 (1988), the Court rejected the circuit court's ruling that "any `direct' reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in Griffin." Robinson, 485 U.S. at 31. The Court then declined to give Griffin a "broad reading," later noted that the "broad dicta in Griffin to the effect that the Fifth Amendment"prohibited a comment on an accused's right to silence must be viewed in light of the facts of the case, and found that a prosecutor can remark on a defendant's failure to testify if it represents a fair response. Id. at 31, 33.

Likewise, in United States v. Francis, 82 F.3d 77, 79 (4th Cir.), cert. denied, 116 S.Ct. 2513 (1996), the court refused to extend the holding of Griffin to a comment that the evidence was uncontradicted because to do so would "run afoul of the Supreme Court's admonition in Robinson against `giving Griffin a broad reading.'" Therefore, the expansive application of Griffin to the remarks here are contrary to the narrow reading previously mandated in Robinson.

In sum, the Second Circuit's expansive application of Griffin to the remarks here was unwarranted because it applied Griffin in a manner never contemplated by this Court. Application of Griffin in this way -- particularly in light of this Court's decisions that Griffin should be applied narrowly -- supports a finding that this case is worthy of review.

II. There is a Split of Authority on the Propriety of A Prosecutor's Comments on a Defendant's Presence and Demeanor in the Courtroom, and this Case Presents the Court with an Opportunity to Provide Guidance to Lower State and Federal Courts on that Issue.

The issue presented by this case has for some time generated a split of authority that this Court now has the opportunity to resolve. Even the Second Circuit in this case noted a split of authority in state courts regarding the propriety of remarks commenting on the defendant's credibility based on his presence at trial. Agard, 117 F.3d at 707-708, Pet. App. at 38a-39a. And federal courts have long been split on the question of the propriety of comments on a defendant's demeanor or presence in the courtroom. Because this case

presents an unsettled issue of law, it is worthy of this Court's review.

As the Second Circuit noted (id.; Pet. App. at 38a-39a), the highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that prosecutorial commentary on a defendant's presence during the testimony of other witnesses is improper. State v. Cassidy, 672 A.2d 899, 905-08 (Ct. 1996); State v. Jones, 580 A.2d 161, 162-63 (Me. 1990) (prosecutor's comment was improper but defendant failed to preserve issue for appeal); Coreas v. United States, 565 A.2d 594, 604 (D.C. Ct. App. 1989); State v. Hemingway, 528 A.2d 746, 747-78 (Vt. 1987); Commonwealt v. Person, 508 N.E.2d 88, 90-91 (Mass. 1987); Dyson v. United States, 418 A.2d 127, 131 (D.C. Ct. App. 1980); State v. Johnson, 908 P.2d 900, 902-03 (Ct. App. Wa. 1996).

But the Second Circuit also acknowledged that the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas, which addressed remarks identical to those here, did not find error. See People v. Buckey, 378 N.W.2d 432, 436-39 (Mic. 1985); State v. Grilli, 369 N.W.2d 35, 37 (Minn. Ct. App. 1985); State v. Robinson, 384 A.2d 569, 569-70 (N.J. Super. Ct. App. Div. 1978).

Nor does the controversy end there. The comment made by the prosecutor in Agard implicates both the specific issue concerning a defendant's presence in the courtroom and a larger disagreement over the propriety of a prosecutor's comment on a defendant's demeanor or conduct while present in the courtroom. See Agard, 117 F.3d at 718, Pet. App. at 59a-60a (Van Graafeiland, dissenting). This latter issue too has generated a deep split of authority. The First Circuit, for

example, did not find an issue worthy of federal habeas corpus review when evaluating a prosecutor's remark that the defendant remained expressionless and unremorseful in the courtroom. Borodine v. Douzanis, 592 F.2d 1202 (1st Cir. 1979). Likewise, the Fifth and Sixth Circuits have held that a prosecutor's comment on a defendant's expressionless courtroom demeanor did not raise an issue for federal habeas corpus review. Cunningham v. Perini, 655 F.2d 98, 101 (6th Cir. 1981), cert. denied, 455 U.S. 924 (1982); Bishop v. Wainwright, 511 F.2d 664, 667 (5th Cir. 1975), cert. denied, 425 U.S. 980 (1976); see also Six v. Delo, 94 F.3d 469, 476 (8th Cir. 1996)(because prosecutor's comment that asked if defendant had shown remorse was prefaced with a reference to the fact that the jury had watched defendant during the penalty phase of trial, the comment was only intended as a remark on defendant's general demeanor and the jury would not have naturally taken the comment as referring to defendant's failure to testify), cert. denied __ U.S. __, 117 S.Ct. 2418 (1997); United States v. Warren, 973 F.2d 1304, 1307 (6th Cir. 1992) (prosecutor's remark that defendant waited to hear the prosecution witnesses before coming up with his version of the truth was fair comment on the reservation of his opening statement and his allegedly concocted testimony).

Other cases, in disapproving comments on a defendant's courtroom demeanor, have noted the split among the circuits under similar factual scenarios. See United States v. Gatto, 995 F.2d 449 (3d Cir.) (disapproving of comments on defendant's intimidating looks but noting that cases from other circuits seem to advance differing rationales), cert. denied, __ U.S. __, 114 S.Ct 391 (1993); United States v. Schuler, 813 F.2d 978 (9th Cir. 1987) (noting that the First and Fifth Circuits have ruled that remarks about the expressionless courtroom demeanor of

a defendant did not necessarily allude to the failure to testify).[2]

Moreover, to the extent that the Second Circuit's decision implies that a comment on a defendant's exercise of any constitutional right is error without some additional showing, this issue too has divided the circuits.

For example, the extent to which a prosecutor can comment on a defendant's Sixth Amendment right to counsel has been the subject of debate among lower courts. For example, in United States v. McDonald, 620 F.2d 558 (5th Cir. 1980), the prosecutor's comment on the presence of the defendant's lawyer when a search warrant was executed at the defendant's house, which raised the inference of defendant's guilt was ruled to be error; it was an impermissible attempt to prove a defendant's guilt because the defendant sought the assistance of counsel.[3]

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2. The prosecutor's comment, which focussed on defendant's credibility, is consistent with the general precept that the credibility of a defendant who testifies may be assailed like that of any other witness. See generally Brown v. United States, 356 U.S. 148 (1957). In fact, courts often give special instructions that instruct a jury on the interest of a defendant when evaluating his testimony. See, e.g., United States v. Mathias, 836 F.2d 744, 749 (2d Cir. 1988). The prosecutor's comment on the defendant's unique opportunity to present his testimony because he was present throughout the trial is compatible with these principles.

3. But later decisions distinguished McDonald, in part, based on whether the jury was aware that the defendant was represented by counsel. For example, in Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), the court ruled that the prosecutor's comment that the defendant's first reaction when he learned that he might be a suspect was to contact a lawyer, rather than to assist the police in their investigation, did not affect the fairness of a capital sentencing proceeding. The court noted that the jury was already aware that the defendant had sought counsel based on the defendant's own testimony. The Harich court also discussed United States v. Mack, 643 F.2d 1119, 1124 (5th Cir. 1987), in which the prosecutor's reference to the seven defense lawyers who represented defendant at trial was ruled to be harmless because the jury was already aware that defendant was represented by those lawyers.

By contrast, other decisions have noted that when the prosecution reveals that a defendant asked for a lawyer after his arrest, courts have looked at all the circumstances in order to determine how seriously the jury "may have penalized defendant's exercise of his right to counsel." United States v. Daoud, 741 F.2d 478 (1st Cir. 1984). Indeed, the First Circuit stated that "incidental references" to this right need not lead to reversal, and then reviewed decisions of the Fifth and Seventh Circuits that did not require reversal. Id. Thus, these decisions also demonstrate the unsettled nature of the propriety of a prosecutor's reference to a defendant's exercise of a constitutional right. Thus, this case presents this Court with the opportunity to define the analysis to be employed in ruling on the validity of comment regarding a defendant's exercise of his constitutional rights.

In sum, this case is worthy of review because it presents this Court with an opportunity to adopt a standard for determining the propriety of prosecutorial comment on a defendant's exercise of his constitutional rights. More particularly, it allows the court to settle a long-standing dispute over whether it is permissible to comment on the exercise of a defendant's right to be present at trial.

III. This Case is Worthy of Review Because of its Potential Effect on Criminal Trials Nationwide, As Demonstrated by the Extensive Controversy That the Second Circuit's Ruling Has Engendered.

The Agard ruling is also worthy of review because they present an issue of national importance that potentially affect every criminal trial. The ruling has generated considerable controversy, thus indicating an issue that is not only unsettled

but is also of considerable concern to criminal practitioners, judges, and commentators everywhere.

Each of the issues raised by the Agard decision potentially effects criminal trials nationwide. The propriety of a comment on the defendant's presence in the courtroom, to establish that a testifying defendant has an advantage over other witnesses, is an issue that can arise in any case in which a defendant takes the stand. And the propriety of a comment on a defendant's demeanor in the courtroom or the exercise of any other constitutional right may indeed affect any criminal trial. Moreover, the importance of the Agard decision to practitioners is demonstrated by the considerable commentary that the Second Circuit has engendered by its ruling.

The Second Circuit's initial decision has been extensively discussed across the nation. For example, the decision has already been the subject of published commentary on several occasions in the New York Law Journal. See, e.g., Deborah Pines, Circuit's Revised Opinion Reaffirms Grant of Habeas, N.Y.L.J., October 30, 1998, at p. 1; Michael Martin, The Tailoring of Testimony, N.Y.L.J., October 10, 1997, at p. 3; Letters to the Editor, N.Y.L.J., November 7, 1997, at p. 2. Michael Martin's article was critical of the initial Agard decision, and the letter to the editor in response questioned the article's discussion of the court's reasoning in Agard. Thus, it is apparent that the rationale of Agard has generated extensive debate.

Moreover, the initial Agard decision was cited by courts as diverse as the state courts of Connecticut, Massachusetts, Minnesota, and Missouri, and the United States Navy-Marine Corps Court of Criminal Appeals. See, e.g., United States v. Carpenter, 1998 LEXIS 259 (C.C.A. June 30, 1998); Commonwealth v. Jones, 697 N.E.2d 140 (Mass. App. Ct.

1998); Missouri v. Walker, 972 S.W.2d 623 (Mo. Ct. App. 1998); Connecticut v. Shinn, 704 A.2d 816 (Conn. App. Ct. 1997). Finally, the initial Agard decision was discussed in a number of law journal commentaries. See, e.g., Faust F. Rossi, Evidence, 48 Syracuse L. Rev. 659 (1998).

Thus, the controversy over the Second Circuit's rulings in Agard demonstrates the far-reaching national implications of the issue. This controversy supports granting certiorari in order to instruct lower state and federal courts regarding the validity and the application of the rule advanced in Agard.

Respectfully submitted,

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January 18, 1999

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AGARD,

Plaintiff,

- v -

No.: CV-95-2239 (RR)

PORTUNDO,

Defendant.

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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE/HEARING BEFORE THE HONORABLE REENA RAGGI UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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THE COURT: I thought a number of interesting issues were raised by the petitioner in this case and needed careful attention by the court, which is one of the reasons that I have given this quite a bit of thought, and also read the transcript with some care.

Everyone is right. This was a credibility decision for the jury. And I read very carefully the testimony of both the defendant and the victim and there is no question in my mind that this court could not hope, on a cold record, to make credibility determinations between the people. That would not be my task in any event. But in some cases it's easier to get a sense for where the credibility problems were or were not. This is a much more difficult case.

And so for that reason I have looked carefully at the three issues that have been raised by the petitioner.

I also recognize that the jury did acquit on a number of counts and that it is really only on this issue relating to the anal intercourse that a guilty verdict was returned and I think it is appropriate to look at this carefully. But I will say, parenthetically, that while it is not relevant to my consideration of constitutional deprivations, when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a wholesale

verdict; it wrestled with this. That is why there were four days of deliberation.

But my task is to decide whether or not the conviction in this case was obtained in violation of federal constitutional or statutory law.

The first issue is whether the defendant was denied his constitutional right to confront witnesses and to proffer evidence because of the trial court's preclusion of defense experts' testimony.

Now, the questions were posed of various ways but, as I said the precluded testimony basically involved eliciting from the defense expert his opinion as to the likelihood of a finding of rectal trauma to a victim of forcible anal intercourse. This was relevant because the undisputed medical testimony is that the victim in this case did not have any evidence of rectal trauma.

Now, the state court in considering this found that it was error for the trial court not to allow this examination to be conducted of the expert. And while plaintiff's counsel has suggested that I'm not bound by that, as an evidentiary ruling of the state on state law, I think that that is a binding holding. There was at least an error of state law committed. Now the question is whether that rises to a constitutional deprivation.

In this case I am not convinced that habeas relief is warranted. And I will state my reasons, though I recognize the plaintiff's counsel disagrees with this : a reading of the

entire trial transcript, with all the expert testimony, satisfies me that the plaintiff's expert was asked whether or not there would likely be vaginal as well as anal trauma, if there were a rape and anal intercourse. And he indicated that that was not always the case. But the defense expert did say that this kind of trauma is often seen to the anal area, even with consensual anal sex. And that suggests to me that the defendant had ample opportunity to argue to the jury that the victim should not be credited here, because she had no evidence of rectal trauma.

Now, there was a lot of discussion back and forth at the trial court level of what defense counsel meant by forcible and intercourse. I am not concerned with that because, as I said, the state court found that he should have been allowed to ask the question. But I do note that there is an element of that issue, whether we're talking about non-consensual or whether we're talking about the excessive use of physical force. In any event the jury heard that even without any use of force, with consent, with lubrication, there is often rectal trauma. And under these circumstances I think the important point is that the defendant had his argument as to why the victim should not be believed, given that she had no evidence of this.

Now, that is not the only point on which this victim could be impeached. And so to some extent I have to consider whether what happened here was the deprivation of meaningful ability to develop evidence that impeached this witness.

There is no much other evidence that the defense was able to take advantage of to argue to the jury that the witness should not be believed that I cannot say that the small addition of a specific statement by the expert that he, in his experience, had always seen rectal trauma when there was forcible anal intercourse would have added much to this case.

As I said, ultimately, the argument was that she didn't get into a struggle with him over this. And so that is where the issue of forcible activity would have been an issue. It wasn't consensual, but she did not allege that she had been involved in some kind of violent struggle over this.

I don't think, upon reviewing the entire transcript that I can say that this defendant was convicted in violation of his constitutional right to put forward evidence that would have had a significant or even more relevant way of cross-examining or impeaching, I should say, the victim, than was already on the record with the testimony of the experts.

Now, there was limitation on the victim's cross-examination regarding her prior experience in anal intercourse. I recognize that her volunteered statement that she was not really into anal intercourse is not the same thing as her saying: no, never, I never had this experience before. I recognize the argument is that if she had said, no, that the defendant would have then sought to argue that, well, if she had never had this experience one would have more likely expected trauma.

But certainly the people did not try to suggest that she had this experience and that that was why she didn't have the trauma. And so I think that this decision, which is within the discretion of the state trial judge, really involves a state law question of the exercise of discretion and did not involve a denial of the right to impeach sufficient to rise to a constitutional deprivation.

Finally, I have the prosecutorial comments in summation. The prosecutor remarked that the defendant basically had the benefit, as he said, and a benefit unlike all other witnesses of getting to sit and listen to the testimony of other witnesses before he testifies. The prosecutor continued, "That gives you a big advantage, doesn't it? You get to sit down here and think, what I am going to say and how and how am I going to say it? How am I going to fit it into the evidence?"

Now, the suggestion is that this infringed the petitioner's constitutional right to be present at trial and to confront his accusers under the Sixth and Fourteenth Amendments.

I think it's important to understand what this argument is. Of course, the defendant was present at trial and, of course, his counsel did have the opportunity to cross-examine witnesses. The real issue is whether this summation comment somehow suggested to the jury that his presence at trial should be used against him.

Now, while I haven't found much federal law on this point, I have noticed that state courts

split somewhat in their evaluation of this kind of comment. I have found cases by the supreme court of New Mexico, State versus Hoxsie; the Missouri court of appeals, State versus Moomey; a superior court in New Jersey, State versus Robinson; the supreme court of South Dakota, State versus Howard; the court of appeal of Texas, Reed versus State; and supreme court of Michigan, People versus Buckley - all of which seem to hold that there is not any constitutional violation, not any deprivation of the right to be present or the right to confront and cross-examine witnesses in comments such as these.

On the other hand, in Commonwealth versus Elberry (Ph.) by the appeals court of Massachusetts, in State versus Johnson by Division One of the court of appeals of Washington, State versus Hemingway by the supreme court of Vermont, and Jenkins versus the United States by the District of Columbia court of appeals, the suggestion is that such comment is improper.

Having looked at the rationales by these courts, it seems to me that what has to be of concern is whether the comment can be viewed as a fair attempt to talk about the credibility of the defendant and any opportunity he may have had to fabricate - something that is always relevant to a jury's evaluation of any witness's credibility - or whether there is an unfair attempt to suggest that defendant should not be believed because he exercised a constitutional right, namely, the right to be present at trial.

I have to caution the prosecution that I am troubled by the formulation here. This was not a summation that said: Ladies and gentlemen, I want you to be clear that the people recognize the defendant's absolute right to be present at this trial; he has a right to be present and we're not suggesting otherwise.

This was not a summation that then continued to say: But in evaluating his credibility you are entitled to consider what opportunities he may have to tailor his testimony and in that regard you know he heard the testimony of the other witnesses before he testified.

It wasn't an argument focused like that, simply on the opportunity to fabricate. This argument had language in it like: The defendant has a benefit, unlike all the other witnesses. This argument had language like: That gives you a big advantage.

That kind of formulation, I think, does come dangerously close to commenting on the exercise of a right. But I am not going to grant habeas relief on that ground. The Supreme Court has made plain that even when error is committed in the prosecutor's summation, harmless error analysis has to be looked at. And, generally, a single comment by a prosecutor in an otherwise appropriate summation will not give rise to a finding of constitutional deprivation.

Now, erroneous comment in this case, if it was erroneous, did deal with a constitutional right. And so I have to weigh it more heavily for that reason and, mindful of what counsel for

plaintiff has said, I recognize that this was also a close case. But I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from this remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind, as counsel pointed out to me, is the appropriate formulation, that there was any prejudice here or that I have any concern that this may have swayed the verdict.

I would not, for instance, that in a case in which the Second Circuit did grant habeas relief because of a prosecutor's improper remarks, Floyd versus Meechum (Ph.), the severity of the prosecutorial misconduct was so much greater than this. I mean, the prosecutor characterized the defendant as a liar thirty-five times in that case, made repeated references to the defendant's failure to testify, and impermissibly asked the jury to pass on the prosecutor's personal integrity and professional ethnics.

That set of circumstances is so far removed from what occurred here that I really don't think, looked at in context, that this comment, however close I think it is to the lines, would warrant habeas relief.

And so I am going to deny the petition. But because I recognize the seriousness of the issues here I will grant a certificate of probable cause to appeal and you can file notice of appeal, seek further review for your client.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAY AGARD,

Petitioner,

ORDER
CV-95-2239 (RR)

- against -

LEONARD PORTUNDO,
Superintendent, Fishkill Correctional Facility,

Respondent.

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APPEARANCES:

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RAGGI, District Judge:

For the reasons stated on the record of oral argument on March 15, 1996, the petition for a writ of habeas corpus is DENIED and a certificate of probable cause to appeal is GRANTED.

SO ORDERED

Dated: Brooklyn, New York
March 15, 1996

REENA RAGGI
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 336 -- August Term, 1996

(Argued: October 24, 1996 Decided: July 3, 1997)

Docket No. 96-2281

Ray Agard,

Petitioner-Appellant,

v.

Leonard Portuondo, Superintendent
of Fishkill Correctional Facility,

Respondent-Appellee.

Before OAKES, VAN GRAAFEILAND, and WINTER, Circuit Judges.

Ray Agard appeals from the denial of the writ of habeas corpus entered March 21, 1996, in the United States District Court for the Eastern District of New York, following his conviction for first degree sodomy and two counts of third degree weapons possession. Held: The prosecutor's remarks in summation that Agard's presence in the courtroom during trial enabled him to tailor his testimony to meet the state's evidence were harmful constitutional error.

Reversed and remanded.

Judge Winter concurs in a separate opinion; Judge Van Graafeiland dissents in a separate opinion.

Beverly Van Ness, New York, NY, for Petitioner-Appellant.

Ellen C. Abbot, Assistant District Attorney, Queens County, Kew Gardens, NY (Richard A. Brown, District Attorney, Steven J. Chananie and Robin A. Forshaw, Assistant District Attorneys, of counsel), for Respondent-Appellee.

OAKES, Senior Circuit Judge:

Appellant Ray Agard appeals from the denial of the writ of habeas corpus dated March 15, 1996, and entered March 21, 1996, in the United States District Court for the Eastern District of New York, Reena Raggi, Judge.

Petitioner was convicted on February 25, 1991, in the Supreme Court of the State of New York, Queens County, Justice Arthur J. Cooperman presiding, of first degree sodomy and two counts of third degree weapons possession. He was sentenced to concurrent terms of 10 to 20 years' and 31/2 to 7

years' imprisonment. Following the December 20, 1993, dismissal of one of the weapons possession counts and affirmance on the other counts, People v. Agard, 199 A.D.2d 401, 402, 606 N.Y.S.2d 239, 240 (2d Dep't 1993), Agard's application for leave to appeal was denied, Judge Ciparick, People v. Agard, 83 N.Y.2d 868, 613 N.Y.S.2d 129, 635 N.E.2d 298 (1994). Agard then petitioned for the writ of habeas corpus pursuant to 28 U.S.C. SS 2254. The district court denied the petition, rejecting Agard's claims that his Sixth and Fourteenth Amendment rights had been violated at trial, but granted him a certificate of probable cause, permitting him to pursue this appeal. Transcript of Civil Cause for Status Conference/Hearing at 23, Agard v. Portundo (sic), No. CV-95-2239 (E.D.N.Y. March 15, 1996) (hereafter "District Court Transcript"). Agard now appeals to this court, asserting that the trial court erred in 1) refusing to permit defense counsel to question the victim about her prior sexual history; 2) limiting Agard's expert's testimony regarding the amount of force required to sustain rectal trauma during anal sodomy; and 3) permitting the prosecution to imply in closing arguments that petitioner, by virtue of being present in the courtroom throughout trial, gained the unique opportunity to fabricate his testimony to meet the state's evidence. We find no error on the first point. The second ruling, while erroneous, does not constitute harmful or constitutional error. The trial court's ruling on the last point, however, infringes upon Agard's constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments, and constitutes harmful error. We therefore reverse the district court and remand.

I

Facts

Agard met Nessa Winder and Breda Keegan, the complainants in the criminal action, at a Manhattan bar and night club on Friday, April 27, 1990. Petitioner's testimony and that of his friend and defense witness Adolph Kiah largely -- though not entirely -- squares with the complainants' story about the events of the following weekend. The witnesses agree that Agard and Winder started a sexual relationship in the wee hours of Saturday morning; spent part of Saturday afternoon on the beach with Keegan and Agard's roommate Freddy; and returned to Agard's apartment for a nap, but stayed until morning. The People and petitioner, however, presented conflicting stories about the extent of that sexual relationship, as well as what occurred a week later on the morning of Sunday, May 6, 1990. The People alleged that the petitioner committed an assault and, using threats and violence, eight acts of rape and forcible sodomy against Winder. Agard, by contrast, testified that he and Winder woke up after a night out on the town, engaged in consensual vaginal intercourse and then fell back asleep for several hours, when upon reawakening a quarrel erupted over the lateness of the hour during which she scratched his lip and he struck her.

A. The People's Case

The People's case consisted of testimony from police investigators, medical experts and Keegan and Winder. At the time of trial, Winder and Keegan were both twenty-three year old women, and friends of eight years. They each moved to the United States from Ireland in 1989, and soon became roommates, sharing a Brooklyn apartment with two other people. On the evening of April 27th, Keegan and Winder went to the Cavacanum, a bar in lower Manhattan. Winder recalled

Agard approaching the women and offering to buy them drinks. He was "friendly" and the three went together downstairs to the club's dance area. Agard later invited Winder back to his apartment and she accepted. As she recalled, they were getting along "very well." Before they departed, Agard gave Keegan the telephone number to his apartment so she could call to say she had made it home safely.

Agard shared the top floor of a house in Queens with three roommates. Their landlady occupied the ground-floor apartment. Winder was introduced to Agard's roommate Freddy. Agard, who had earlier remarked that he carried a gun when riding the subway, showed Winder an automatic handgun kept in his closet. They then watched "blue" movies depicting mainly anal intercourse. Winder recalled Agard "mentioning" anal intercourse and "motioning that way" later that night when the two had sex, but she told him that she was not "into it" and "just said no." Winder testified that they did not engage in anal intercourse on that day, but did engage in consensual vaginal and oral sex before falling asleep. In the morning, they had intercourse again.

After a trip to a beach on Staten Island with Freddy and Keegan, Agard and Winder returned to Agard's apartment where they spent the night. Winder testified that she awoke at midnight, hoping to return to the Cavacanum where she and Agard had planned to meet Keegan, but Keegan could not be reached by phone and Agard did not want to go out again. After Agard attempted to initiate sex, Winder explained that, because she was expecting a boyfriend from England, she felt "we shouldn't go on like this." Winder testified that they did not engage in sexual relations that night.

The following week Agard made several attempts to

contact Keegan and Winder. He suggested that he have dinner on Thursday night with Keegan, whose job was located near Agard's, but Keegan was not home when he called her to arrange the date. On Saturday, Agard called the women several times to see if they wanted to meet again at the Cavacanum. After he said that he would not call again, the women called him and agreed to meet at the club.

The women arrived late and found Agard, who was "short" with them, and Freddy. The four drank and talked for several hours. Cocaine was also used by at least some members of the party, including Winder. Winder testified that she eventually became drunk and blacked out: the last thing she recalled from that evening was Agard's friend Kiah arriving and the group making plans to go to another club. Keegan testified that Winder, although drunk and tired, was still "walking and talking" even after the time of her memory lapse. Keegan explained that she, Winder, Agard, Freddy, and Kiah, along with two other women who needed a ride, left for the other club in Kiah's car. On the way, Winder sat on Agard's lap in the front seat, but was not physically affectionate because she was asleep.

Only the two women passengers were allowed into the second club which was closing up when the group arrived. The party of five moved on to a bar in another neighborhood where they continued to drink. Keegan recalls that Winder was asleep or falling asleep, and did not even drink her drink. Sometime between 4:00 and 4:30 in the morning, the party left the bar. Keegan recalls wanting to return to her apartment in Brooklyn with Winder, but at Agard's suggestion the group returned to his apartment.

Kiah and Freddy left to buy beer while Agard let the women into his apartment. They settled into Agard's bedroom.

Keegan testified that Winder immediately fell asleep, fully-clothed, on Agard's bed. When Keegan indicated that she wanted to call a cab, Agard responded that "he had sent his friends for beer and the least [they] could do is stay to have a beer after he had gone to that amount of trouble." According to Keegan, Agard became verbally abusive and threatening. He called her "Gaelic," told her to get her "monkey ass out of the house," said "he was going to smash [her] face in," and ordered her to "shut the fuck up."

He then went over to a chest of drawers against the wall and took out a gun. After clicking a cartridge into the handle, Agard placed the gun against Keegan's head, saying, "I'm going to give you three seconds to shut up." Agard then put the gun back into the drawer and continued to "abuse" Keegan until Kiah and Freddy returned with beer. Agard, by Keegan's recollection, told them "to get the bitch out of the house or he was going to hurt her . . . ."

Keegan asked Agard to follow her into Freddy's room so they could discuss what was making him so mad. They moved into the other room where Agard continued to threaten her, saying that she would "never leave the house alive" and that she could go "if you (Keegan) give both my friends head." Agard continued to change his mind, ordering Keegan to leave and then telling her to stay in Freddy's room. Keegan pleaded to see Winder, but when she was allowed into the bedroom Winder could not be awakened. Returning to the kitchen, Keegan found Kiah preparing to leave. Although initially reluctant, Keegan eventually decided to leave with Kiah. As she headed out the door of Agard's apartment and down the stairs, Keegan brushed by Agard, who turned and grabbed her around the neck. Keegan screamed, and he let her go, cursing her for getting him in trouble with his landlady. Keegan testified that she told Kiah during the trip to Brooklyn that Agard had threatened her with

a gun.

Keegan arrived home at about 6:00 in the morning and went to bed. At 9:00 a.m. she called Agard's apartment to speak with Winder, but he answered the phone and hung up. She did not try again until 1:00 p.m., at which time she was told Winder had left. Agard immediately called Keegan back to tell her how mad he was at her for having awakened his landlady, and to threaten her that he would call again in a few days to let her know whether they had "a major fucking problem."

Winder testified that she awoke at 9:30 a.m., wearing only her "vest,"[1] unable to remember how she got where she was, but in a rush to get home because she was expecting her English friend. She remembered that at some point Agard had asked her for "a fuck" and she said "no." She asked Agard to call her a cab, then tried to do so herself. He put the phone down and began to "curse [her]," saying she was a "no good ten-cent whore" and that she had "planned this." He also "curs[ed]" Keegan, saying that she had awakened the landlady, and called the women "no good white trash."

Winder began to get dressed and Agard came up from behind her and slapped her in the face. He tried to back her against the wall, but she moved to the other side of the bed where he kicked her. He told her she had "two choices, either I [Winder] do things his way or I would like the other thing less." He then came over to her and "put his penis into her mouth" and pulled on her hair. She pulled away from him, saying she "couldn't do it anymore." Agard continued to insult Winder. When she repeated that she could not do what he wanted, he

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1. It is not clear from the record what Winder meant by "vest."

took his gun from the drawer and began "putting cartridges into it," at which point Winder said "okay" and allowed him to resume the oral sodomy.

Winder said that she "needed to go to the bathroom," and Agard permitted her to leave. After initially locking herself in, she fled the bathroom for Freddy's bedroom where she grabbed Freddy and begged him for help. She was able to bring Freddy with her into Agard's room, but Freddy left when ordered out. Recalling Agard's comment about the landlady, Winder screamed, causing him to punch her three times in the face. Agard continued the verbal threats, ordered Winder to leave, but told her to "make [him] come first." She "managed to scratch his lip," but could not see any injury her scratch may have produced. He threatened her first with a beer bottle, holding it above her head as if ready to strike. When she still refused to engage in sex, he retrieved the gun and put it to her head, saying "[t]his is goodbye." At this point, Winder agreed to comply with his demands.

She asked to return to the bathroom for a drink of water. He refused, but brought her a beer for her thirst. Agard went to the bathroom himself, and Winder again fled to Freddy's bedroom. Petitioner followed her, picking her up off Freddy's bed and carrying her "by the head and by the hair" back to his own bedroom, where he threatened to kill her.

Agard raped and sodomized Winder while slapping her buttocks before allowing her to return to the bathroom. She returned to his bedroom without making further efforts to flee, and he committed additional acts of anal sodomy, oral sodomy, and rape. Winder feigned a seizure in an effort to escape, but as soon as she "resumed normality," he raped her again.

Finally, Agard's landlady called the apartment twice, allowing Winder an opportunity to dress. Agard then called a taxi to take her back to Brooklyn and escorted her downstairs, saying "[d]on't dare call the police" and threatening her if she did. Winder got into the cab, but did not go far because she had no money. The driver dropped her off down the street from Agard's apartment where she was eventually able to phone Keegan. Winder hid until Keegan came for her, and the two women went to the police station.

That afternoon Doctor Ardeshir Karimi examined Winder at Elmhurst Hospital. He did not see any abnormality or signs of trauma in Winder's vagina or anus. Dr. Karimi took samples for a Vitullo kit from Winder's mouth, vagina, and anus. Later testing by Detective Robert Lewis determined that only the vaginal sample was positive for spermatozoa.

The next day, May 7, 1990, Winder and Keegan found the following message on the answering machine in their shared apartment:

> You will know who this message is for. After careful consideration of this entire situation, it was my fault. I was a golden asshole. The only thing I can do is say I'm sorry and that's it. I'll never bother you again. Live safely and peacefully. Goodbye.

At trial both women identified Agard's voice on the tape.

On May 8, 1990, Detective Philip Giardina executed a

search warrant at Agard's home where he recovered a .45 caliber automatic handgun and two magazines containing shells. After his arrest the same day, Agard first denied that he had a gun, then later admitted to having it but said it was not real, did not work, or belonged to a friend. As to the sex crimes, Agard did not equivocate: he stated that he had consensual sex with Winder, that they got into a fight, and that she scratched him and he "mushed her face."

B. The Defense's Case

Agard corroborated much of the complainants' account about the first weekend after they met. His story, however, departed from Winder's in the following respects: he said that on their first night together, they engaged in consensual, anal intercourse, using lubricants, and that they engaged in consensual intercourse on Saturday night. Agard also testified that Winder found his gun in the closet when she borrowed his bathrobe, and that she tried on the holster.

The discrepancies between Agard's and the complainants' stories became pronounced with respect to the events of the second weekend. Agard testified that, during the drive to the second nightclub, Winder was not only awake but kissing and fondling him as she sat on his lap in the front seat of the car. He also recalled that Keegan had not wanted to return to his home in Queens, but that Winder had had no such reservations.

According to Agard, Keegan was "loud" about her desire to go home when the group arrived at his apartment in Queens. Agard testified that as he escorted his "agitated" guest out to Kiah's car, they passed his landlady who was "upset" about the noise Keegan was making. Agard returned to his room

and went to sleep on his bed next to Winder. It was about 6:00 a.m.

Three hours later, Agard and Winder awoke, and, according to Agard, had voluntary vaginal sex before falling asleep again. He testified that they reawakened sometime between noon and 1:00 p.m., and that Winder was "upset," "kind of hyper," and concerned that her boyfriend was going to kill her. Trying to quiet her, he approached her from behind and took hold of her shoulders. She turned and smacked him, taking hold of his lower lip and scratching him on the inside of his mouth. Reflexively, he used the palm of his open hand to push her away, "mush[ing]" her in the eye. When the cab he had already called arrived, he gave Winder $25 and sent her on her way. Although he was "annoyed" about the trouble the women had caused him with his landlady, he was not "angry." The following day he called to apologize "because [he] felt that [he] should not have mushed her in the face."

Kiah also testified for the defense, contradicting Keegan on several points: he recalled that Winder embraced and kissed Agard during the drive to the second club. He also remembered that she was talking and drinking with the others at the last bar, not asleep as Keegan recollected. He further said that Keegan never told him that Agard threatened her with a gun.

Nineteen counts against Agard were submitted to the jury, two concerning Keegan, fourteen associated with Winder. The remaining three counts were weapons charges. The jury acquitted Agard on all but two counts relating to the women: he was found guilty of one of the two anal sodomy counts, and of felony assault in which rape was the underlying felony. He was also convicted of two counts of third degree weapons

possession. The trial court dismissed the assault conviction as repugnant to the rape acquittal, and one of the third degree weapons possessions convictions was reversed on appeal.

II

Issues

A. Limitation of Victim's Testimony

Agard's first assertion of constitutional error relates to the trial court's limitation of defense counsel's attempt to cross-examine Winder on whether she had ever engaged in anal intercourse with persons other than Agard. At a sidebar, the defense asserted that the testimony was not being sought for "promiscuity purposes or anything of that nature." The argument was that the prosecution had attempted to overcome the medical evidence showing no anal trauma, by eliciting on direct examination Winder's testimony that she did not struggle during the incident; this, Agard's counsel asserted, "opened the door" to sexual history testimony probative of what the medical record ought to reflect. The trial court ruled that the defense's inquiry about prior sexual history was forbidden by the state rules of evidence, and that any probative value was far exceeded by the prejudice. It also rejected the defense's suggestion that the testimony be allowed with a limiting instruction to the jury.

Agard claims that the trial court's ruling denied him the ability to present his defense, thereby violating his Sixth and Fourteenth Amendment rights to confrontation and to due process. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 636 (1986); Williams v. Lord, 996 F.2d 1481, 1483 (2d Cir. 1993); Rosario v. Kuhlman, 839 F.2d

918, 924 (2d Cir. 1988). In assessing this claim, we note that a state may restrict a defendant's introduction of evidence without violating the constitutional right to present a defense so long as those restrictions are neither "arbitrary [n]or disproportionate to the purposes they are designed to serve." Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987). See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967).

Rape shield statutes have been enacted by Congress and the majority of states. Fed. R. Evid. 412; Michigan v. Lucas, 500 U.S. 145, 146, 111 S. Ct. 1743, 1744, 114 L. Ed. 2d 205 (1991). The New York law relied upon by the trial court bars, as a general rule, the use at trial of evidence of an alleged victim's prior sexual conduct with persons other than the defendant, but grants the court discretion to admit such evidence in the interest of justice. N.Y. Crim. Proc. Law SS 60.42 (McKinney 1992). This discretionary power, however, must be exercised within the boundaries of the Sixth and Fourteenth Amendments.

Petitioner argues to this court that the questions he intended to ask Winder are not the kind that rape shield statutes such as New York's are intended to prevent. The interrogation of Winder was, he asserts, not an attempt to harass her or soil her name with intrusive questions and innuendo about promiscuity. Nor did he wish to show that she had a propensity to consent to anal intercourse which was demonstrated by her past behavior. In this appeal, he avows that he sought a negative answer to his questions. Supposedly, had Winder answered that she had little or no experience with anal sodomy, her response would have strengthened the importance of the medical evidence showing no anal trauma. Furthermore, he points out that Winder already had admitted to meeting a man at a bar and going home

with him to engage in sexual intercourse; that the prosecutor had said to the jury that the complainant was "sexually active"; and that Winder had testified that she told Agard that she was not "into" anal intercourse, thereby suggesting she was inexperienced with that activity but doing so without specificity. Petitioner would have us find that, because these details were before the jury, any further testimony about Winder's past could do little additional harm.

We disagree with petitioner that his counsel's questioning of Winder was obviously outside the usual application of the rape shield laws. Rape shield laws serve the broad purpose of protecting the victims of rape from harassment and embarrassment in court, and by doing so seek to lessen women's historical unwillingness to report these crimes. Yet they also serve a second purpose: they reinforce the trial judge's traditional power to keep inflammatory and distracting evidence from the jury. See Sandoval v. Acevedo, 996 F.2d 145, 148-49 (7th Cir. 1993) (citing Lucas, 500 U.S. 145, 111 S. Ct. 1743). In this respect, rape shield laws are an example of the court's traditional power to exclude evidence the prejudicial character of which far exceeds probative value. Evidence of past sexual conduct and particularly of, perhaps, more unusual activities such as anal intercourse, is likely to distract a jury from the contemporaneous evidence it is asked to consider. And as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act. For this reason, we believe that this second purpose of rape shield laws is well-served by excluding defense counsel's proposed questions to Winder. We find that the New York rape shield law is a restriction that both facially and as applied in Agard's case was neither arbitrary nor "disproportionate to the purposes [it was] designed to serve,"

and therefore does not violate any constitutional prohibition.

Furthermore, we are not persuaded by Agard's assertion that the other purpose of the rape shield statutes is not at play. His argument is weakened by an inconsistency in his own position: he assertedly expected Winder to answer that she "never" or only "once or twice" engaged in this sexual activity. Pet. Br. at 44. But Agard himself testified that he and Winder engaged in anal intercourse on the weekend they met, a statement clearly conflicting with the answer the defense now claims it anticipated. If Winder testified that she had on previous occasions consented to anal intercourse with other partners, her testimony would have been precisely the kind of forbidden sexual "propensity" evidence supporting Agard's claim that the two had engaged in consensual sodomy on their first night together. While a negative answer could have provided some additional measure of support -- however slight -- for the defense's argument concerning the medical record, an affirmative answer could also have aided its cause. In light of this wrinkle in petitioner's position, we, like the district court, are "skeptical" that the defense truly sought the answer "never," and that it truly had no intent to embarrass Winder or lessen her credibility with the jury. Regardless of Winder's answer, her testimony would not have altered the ultimate verdict, and it carried a risk of distracting and prejudicing the jury. We therefore agree with the state and district courts that the trial court's ruling on this point was not erroneous.

B. Limitation on Expert Testimony

Agard's second assertion of error relates to the trial court's limitation on the testimony of an expert witness for the defense. Winder testified that, when she was forced to engage

in sodomy, her anus was "sore" and she twice had to pull away from Agard due to pain. On cross-examination, the defense elicited the following testimony from Winder:

> Q. I believe you also testified that during this incident you say that [Agard] forced his penis into your anus; is that correct?
>
> A. Yes.
>
> Q. And that was against your will; correct?
>
> A. Yes.
>
> Q. And in fact that hurt, made it sore?
>
> A. Yes.
>
> Q. And that it's your testimony that at some subsequent time [he] again forced his penis into your anus?
>
> A. Yes. Forced -- yes.
>
> Q. And that hurt very much; correct?
>
> A. Yes.

Later in the trial, the prosecution established that Winder did not struggle with Agard because "[she] knew it would be more

painful" if she resisted.

The prosecution asked its expert witness, Dr. Karimi, questions about the probability of discernible trauma to the rectum as a result of anal penetration. When asked whether "if a woman during anal intercourse felt pain, does that mean you would see trauma," Karimi replied "[n]o." Asked to explain, he said that "for . . . trauma you have to have moderate or severe force. If the force is less than moderate, there wouldn't be any trauma."

The defense countered with expert testimony from Dr. Jeffrey Gilbert, who had not examined Winder but had reviewed her medical records. Based on his experience of conducting "thousands" of pelvic examinations, he testified that there is "very often" visible evidence of injury to the rectum when individuals engage in voluntary anal intercourse. He further explained that "at times with the presence of lubrication the injuries are still present." On cross-examination, he adopted the prosecutor's term "sometimes" in the place of "very often," and also acknowledged that trauma is not necessarily the result of such activity.

Defense counsel also posed a number of hypothetical questions to Dr. Gilbert concerning the likelihood of trauma as a result of "forcible" anal intercourse "against the will" of the victim who felt pain and soreness. All were objected to and the objections sustained by the trial court. The defense argued that the questions were proper, because they comported with Winder's testimony on cross-examination that Agard "forced" his penis into her anus. The prosecution countered that the questions were not relevant to the case, because the victim alleged that threats -- not physical force -- were used by Agard

to overcome her will. Or, in the prosecutor's own words, "[y]ou didn't ask your expert if there was no struggle would there be trauma." The court continued to sustain prosecution objections to any question containing the words "force" or "forcible" on both direct and redirect examination. On summation, the prosecution paraphrased both experts' testimony, "[Winder] told you she didn't struggle when he was inside of her . . . . Dr. Gilbert and Dr. Karimi told you that if there is no struggle, there is not always going to be trauma, and I ask you to rely on [their] testimony . . . ." The defense moved for a mistrial based on improper curtailment of its examination, and continued to press its disagreement with the court's decision through the trial and to the Appellate Division, Second Department.

Our analysis of Agard's contention is aided by the express conclusion of the Appellate Division that curtailment of the defense's expert testimony was improper under New York law (though the court did hold the error to be harmless). Agard, 199 A.D.2d at 402-03, 606 N.Y.S.2d at 240-41 ("the hypothetical question posed to the defendant's expert was based on facts which were 'fairly inferable from the evidence,' which included indications of physical force as well as threats") (citing, inter alia, Tarlowe v. Metropolitan Ski Slopes, Inc., 28 N.Y.2d 410, 414, 322 N.Y.S.2d 665, 667, 271 N.E.2d 515, 516 (1971)). We find that, while expert testimony is limited by the requirements of relevancy and by the trial court's traditional discretion to prevent prejudicial or confusing testimony, these considerations did not warrant keeping this important information from the jury.

The trial court's rulings demonstrate a concern over an ambiguity in the words "force" and "forcible." Both terms may be used to mean either physical compulsion or doing something against the will of another. In the latter instance, physical

coercion may not be present; for example, as the prosecution alleged in this case, threats can be used to overcome the will of another. The prosecution was rightly concerned that the defense's questions to its expert could have led the jury to misunderstand exactly which meaning of the word "force" was intended. Indeed, as the Appellate Division noted, the mixed roles of threats and physical force were at issue in the trial, as Winder alleged acts of physical force, including a kick, punches and slaps on her buttocks during the anal penetration. Agard, 199 A.D.2d at 402, 606 N.Y.S.2d at 240.

We agree that the term "force" is ambiguous and potentially misleading. However, that ambiguity was not a reason to exclude the expert testimony entirely, at least when the degree of force exercised by the defendant was at issue in the trial. Rather, it was a proper subject for the prosecutor's cross-examination of Dr. Gilbert. The prosecution could have brought out the fact that Winder did not struggle with Agard, and asked what effect that fact would have on Gilbert's opinion.

Moreover, the defense was not permitted to ask certain questions which to some extent clarified the meaning of the term "force" and which further used specific language taken from Winder's testimony. For example, defense counsel asked:

> Now, could you tell us within a reasonable degree of medical certainty what sort of findings you would expect if a woman claimed to have . . . forcible anal intercourse against her will, the second time longer than the first, both times being sore and both times being painful?

These additional details gave the defense's interrogation further

grounding in complainant's testimony, thereby making those questions even more clearly relevant. We therefore find error in the trial court's ruling.

Our question, however, is whether the ruling, viewed in light of the whole record, deprived Agard of a fundamentally fair trial. Rosario, 839 F.2d at 925. As we outlined in our discussion of the rape shield statute, the Sixth and Fourteenth Amendments to our Constitution guarantee a criminal defendant a meaningful opportunity to present a defense. Crane, 476 U.S. at 690, 106 S. Ct. at 2146. Erroneous evidentiary rulings rarely rise to the level of harm to this fundamental constitutional right. To isolate those few situations where such mistakes injure constitutional rights, this court applies the standard of "materiality" as set forth by the Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). See Rosario, 839 F.2d at 924; Taylor v. Curry, 708 F.2d 886, 891 (2d Cir. 1983). Agurs stated:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor

> importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13, 96 S. Ct. at 2401-02 (footnotes omitted).

In order to evaluate the importance of the additional expert testimony in this case, therefore, we must look at the strength of the evidence supporting Agard's conviction.

On direct review, the Appellate Division characterized the evidence of his guilt as "overwhelming." Having reviewed the entire record of the trial, we cannot agree with that characterization, nor are we required to accept it on habeas review. Annunziato v. Manson, 566 F.2d 410, 413 (2d Cir. 1977). We believe that the lack of medical evidence on the one charge -- forcible anal sodomy -- for which the jury convicted Agard suggests that the jury decided the case primarily, if not solely, upon the credibility of Agard, Winder, and Keegan. We simply do not know the reasoning behind the verdict.[2] We do

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2. Undoubtedly, the verdict was mixed and therefore somewhat confusing. Indeed, during a discussion of the charges to be given to the jury, the trial court commented, "you know, are they going to believe the sodomy counts and not a rape count? I mean it doesn't make any sense." Yet the verdict is not necessarily the result of a jury compromise. The jury could have credited large parts of Winder's testimony about the events of Saturday night and Sunday morning, but nonetheless concluded that, even despite the threats and violence she described, she did not express her unwillingness to engage in oral sex or vaginal intercourse with sufficient clarity to make Agard guilty of those crimes.The jury could also have believed her testimony that anal penetration occurred. It could further have believed that she was unwilling to engage in anal intercourse, and that Agard knew as much from their conversation the previous weekend. If the jury believed this testimony, it would explain the anal sodomy conviction as well as the acquittals on the charges of rape and forcible oral sodomy. Alternatively, of course, the numerous acquittals may indicate that the jury did not believe most of Winder's and Keegan's testimony. In any event, credibility was clearly the primary issue.

know, however, that, as the district court duly noted, Winder and Agard presented sharply conflicting stories making their credibility the central issue in the trial;[3] that there was very little

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3. Even the State agrees that credibility was the main issue at trial:

> Defense counsel, in his summation, argued vigorously that the prosecution's witnesses had fabricated the allegations against petitioner, and that petitioner's testimony was more credible than the testimony of the prosecution's witnesses. He asked the jury to compare the victim's testimony with petitioner's testimony, and to "consider the reasonableness of the two different stories." Defense counsel also argued that petitioner's description of the events of May 6, 1990, was a "more reasonable and natural extension of the relationship that started the weekend before," and described petitioner's testimony as "consistent."
>
> In response, the prosecutor argued that Winder had been victimized by petitioner even though petitioner wanted the jury to think that he was the victim. She asked the jury to consider that petition, rather than (sic) the victim, was the person who had been less than straightforward because he was an interested witness. Further, the prosecutor pointed to the fact that petitioner had had the opportunity to hear all of the testimony in the case before he testified. These comments fairly responded to defense counsel's statements that the victim lied, and were therefore proper.

State's Br. at 46-47 (citations ro record omitted). Likewise, the district court:

> .... This was a credibility decision for the jury. And I read very carefully the testimony of both the defendant and the victim and there is no question in my mind that this could could not hope, on a cold record, to make credibility determinations between the people. That would not be my task in any event. But in some cases it's easier to get a sense for where the credibility problems were or were not. This is a more more difficult case.
>
> . . .
>
> I also recognize that the jury did acquit on a number of counts and that it is really only on this issue relating to the anal intercourse that a guilty verdict was returned and I think it is appropriate to look at this carefully. But I will say, parenthetically, that while it is not relevant to my consideration of constitutional deprivations, when a jury returns a mixed verdict such as this, one has to assume that it too looked at the evidence quite carefully. It didn't simply discount all of the people's testimony and reject it, or discount everything that the defendant said and throw it out and simply return a

evidence beyond the medical findings presented to the jury to support or undermine the testimony of the two most important witnesses; and that the jury's verdict does not demonstrate any clear resolution of the credibility question. In light of these observations, we think that the evidence of Agard's guilt cannot be characterized as "overwhelming." We thus reject this basis for the conclusion of the Appellate Division that the error was harmless.

The Appellate Division also stated, however, that it found the erroneous evidentiary ruling to be harmless because "the defendant's expert was permitted to testify that individuals who engaged in voluntary anal intercourse, even using lubricants, frequently suffered from conspicuous rectal trauma." Agard, 199 A.D.2d at 403, 606 N.Y.S.2d at 241. We agree that this opinion evidence allowed Agard to make an argument about the significance of the lack of medical evidence of sodomy, and thereby saved the erroneous ruling from rising to the level of constitutional harm because it did not deprive him of the opportunity to make an argument to the jury. Indeed, the facts of Agurs support this conclusion. The Court there concluded that the jury's ignorance of the victim's criminal record was not material to the defendant's self-defense defense, in part because evidence was already on record of the victim's propensity for violence, and thus the record was "largely cumulative." Agurs, 427 U.S. at 114, 96 S. Ct. at 2402. Here, too, additional opinion testimony would only add further support for a defense argument clearly before the jury.

> wholesale verdict, it wrestled with this. That is why there were four days of deliberation.

District Court Transcript at 14-15.

C. Prosecutor's Summation Remarks

Agard's third and final assertion of error on appeal is that his rights to confront the witnesses against him and to have a fair trial were violated by the prosecutor's closing remarks. In her summation, the prosecutor referred to Agard as "the one who had an answer for everything" and stated that "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." At the end of summation, she stated:

> You know, ladies and gentlemen, unlike all the other witnesses . . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
>
> He's a smart man. I never said he was stupid. . . . He used everything to his advantage.

Petitioner's counsel later moved for a mistrial based on these remarks, stating that "comment[s] on Agard's presence at the trial [were improper]. He has the absolute constitutional right to be here. . . . It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial." In denying that motion, the trial court judge responded that "[t]he fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as (sic) a matter of fact." On Agard's direct appeal of his conviction, the Appellate Division stated simply that it found his argument on this point to be meritless. Agard, 199 A.D.2d at 403, 606 N.Y.S.2d at 241.

On habeas review, the district court stated that it was "troubled by" these comments, as they came "dangerously close to commenting on the exercise of a [constitutional] right." District Court Transcript at 21, 22. The court ultimately determined, however, that the remarks were not so prejudicial as to warrant habeas relief.[4]

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4. We are not certain whether the district court reached this conclusion because it was unsure that error had occurred in the first place, or because it was unsure whether that error was harmful. Compare District Court Transcript at 22 ("erroneous comment in this case, if it was erroneous, did deal with a constitutional right.") (emphasis added) with id. ("...I recognize that this was also a close case. But I am not satisfied that the petitioner has demonstrated that he suffered any actual prejudice from this remark. I have read the entire summations of both counsel and in context I cannot say that I have any question in my mind . . . that there was any prejudice here or that I may have any concern that this may have swayed the verdict." See also id. at 23 ("I really don't think, looked at in context, that this comment, however close I think it is to the line, would warrant habeas relief.")

1. Constitutional Error Analysis

Although we have unearthed no federal case which examines this issue, numerous state courts have addressed it. The highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that such prosecutorial commentary is improper. State v. Cassidy, 672 A.2d 899, 905-08 (Ct. 1996); State v. Jones, 580 A.2d 161, 162-63 (Me. 1990) (prosecutor's comment was improper but defendant failed to preserve issue for appeal); Coreas v. United States, 565 A.2d 594, 604 (D.C. Ct. App. 1989); State v. Hemingway, 528 A.2d 746, 747-48 (Vt. 1987); Commonwealth v. Person, 508 N.E.2d 88, 90-91 (Mass. 1987); Dyson v. United States, 418 A.2d 127, 131 (D.C. Ct. App. 1980); State v. Johnson, 908 P.2d 900, 902-03 (Ct. App. Wa. 1996). See also, Commonwealth v. Elberry, 645 N.E.2d 41, 42-43 (Mass. App. Ct. 1995) (although comments constituted error, they were immediately cured by trial court); Jenkins v. United States, 374 A.2d 581, 583-84 (D.C. Ct. App. 1977). On the other hand, the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas have held otherwise. See People v. Buckey, 378 N.W.2d 432, 436-39 (Mich. 1985) (disagreeing with People v. Smith, 252 N.W.2d 488, 492 (Mich. Ct. App. 1977) (comments, though ultimately harmless, were "inadvisable") and People v. Fredericks, 335 N.W.2d 919, 921-22 (Mich. Ct. App. 1983) (remarks seriously prejudiced defendant's case, which depended upon his own testimony)); State v. Grilli, 369 N.W.2d 35, 37 (Minn. Ct. App. 1985); State v. Robinson, 384 A.2d 569, 569-70 (N.J. Super. Ct. App. Div. 1978). These courts have addressed prosecutorial summation arguments virtually identical to the one made in

Agard.[5]

Other state courts have addressed similar comments of prosecutors during cross-examination of the defendant. Although many of the state cases rely upon and make reference to summation cases and cross-examination cases as though they were analytically interchangeable, we believe that they should be addressed separately because summation remarks raise constitutional issues which either are not present or are of less

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5. Buckey, Grilli, and Robinson rejected the argument that the Sixth Amendment was violated by a prosecutor's commenting upon the defendant's unique opportunity for testimonial fabrication. In Grilli, the prosecutor had made this type of comment both during cross-examination and upon closing, thereby clouding the issue. Furthermore, defense counsel failed to object to the prosecutor's comments at either stage, thus waiving the defendant's right to review. It is therefore unclear to us exactly how much weight to assign to that court's exceedingly brief dismissal of the issue. See Grilli, 369 N.W.2d at 37 ("The prosecutor's cross-examination was not improper. The prosecutor was free to argue and attack appellant's credibility. Also, appellant failed to make any objection and waived his right to review of this issue. Similarly, the closing argument was not improper nor was any objection made to it." (citations and new paragraph omitted). Robinson likewise briefly dismissed the issue, and also confused the question by discussing it as though it had arisen upon cross-examination even though it was actually made during summation:

> It is well settled that when a defendant waives his right to remain silent and takes the stand in his own defense, he thereby subjects himself to cross-examination as to the credibility of his story. And the issue would involve whether the story had been fabricated. Here the issue of defendant's credibility was whether his testimony was tailored to that of the testimony of other witnesses, a perfectly proper.

Robinson, 384 A.2d at 570 (citations omitted). We therefore place little weight on the arguments raised by these cases, and center more upon those made in Buckey, though we do note that all three cases base their holding upon the principle that the prosecutor may properly argue to defendant's lack of crediblity.

concern when made upon cross-examination.[6] We today express no opinion as to the propriety or constitutionality of similar remarks made during cross-examination.[7] We hold only that it is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. Such comments violate a criminal defendant's right to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.

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6. On cross-examination, a prosecutor may legitimately question any witness about his opportunity and motivation to fabricate testimony. Such questioning goes to the witness' credibility, and the witness is afforded an opportunity to respond and repair the attack. Summation remarks, however, occur too late for the witness to rehabilitate his credibility and may, as in this case, occur too late for even his attorney to respond to the attack. But see Sherrod v. United States, 478 A.2d 644, 654 (D.C. Ct. App. 1984) ("This court has indicated it is impermissible for the prosecutor to comment in closing argument on appellant's exercise of his Sixth Amendment right to confront witnesses. Accomplishing the same result by cross-examination is no less objectionable, since the prosecutor thereby can also seek to have the jury draw impermissible inferences from appellant'sexercise of his constitutional right to confront witnesses." Id. (citations omitted).

7. In keeping with this decision, we do not (with one exception) address herein those cases which assessed similar comments made during cross-examination. We do note, however, that the D.C. Court of Appeals ruled it unconstitutional for a prosecutor to make such comments even upon cross-examination, Sherrod, 478 A.2d at 654, in contrast with several other courts which held that a defendant who takes the stand subjects himself to cross-examination as to credibility. State v. Smith, 917 P.2d 1108, 111-12 (Wa. Ct. App. 1996) (no Sixth Amendment violation); State v. Hoxsie, 677 P.2d 620, 622 (N.M. 1986), overruled on other grounds by Gallegos v. Citizens Ins. Agency, 779 P.2d 99 (N.M. 1989) (same); State v. Martin, 686 P.2d 937, 941 (N.M. 1984) (no Fifth Amendment violation); People v. Sims, 648 N.Y.S.2d 542 (1st Dep't 1996) (no Fifth or Sixth Amendment violation).

The exception to our general omission of cross-examination cases may be found in note 12, infra, and accompanying text, discussing and distinguishing Smith on other grounds.

a. Defendant's Right to Confrontation

The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. This right applies to state as well as federal prosecutions via the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923 (1965). "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970) (citing Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 137, 36 L. Ed. 1011 (1892)).

We find that a prosecutor's summation remarks noting the defendant's unique opportunity to be present at trial infringe upon that constitutionally guaranteed right. The remarks invite the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and therefore penalize him for exercising that right. The comments, which imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented,[8] force defendants either to forgo the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion. The Sixth Amendment does not permit those comments.

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8. This not only implicates the right to be present at trial, but also the right to testify. Cf. Brooks v. Tennessee, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (statute which required a defendant to testify, if at all, prior to presentation of any other defense testimony, violated defendant's Fifth Amendment right against self-incrimination as well as Fourteenth Amendment right to due process). Other aspects of the infringement on the right to testify are discussed in Part II.C.2., infra.

The remarks are analogous to the tactic of suggesting to juries that guilt can be implied from a defendant's decision to exercise his Fifth Amendment right not to testify, a tactic which has been held unconstitutional. In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the Supreme Court explained:

> [C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614, 85 S. Ct. at 1232-33 (citations and footnote omitted). The Griffin Court recognized that such commentary effectively penalizes the defendant for exercising his Fifth Amendment rights, and held it unconstitutional to require

defendants to choose between their rights.[9] We believe that Griffin principles are appropriately applied to the case at bar.

We therefore hold that the Sixth Amendment right to confrontation prohibits a prosecutor from commenting in summation that a defendant's testimony may be viewed in light of his presence in the courtroom during trial, because such comments violate the defendant's right to be present at trial. The Supreme Court has indicated that Sixth Amendment rights may at times be overcome by an important state interest. Maryland v. Craig, 497 U.S. 836, 850, 110 S. Ct. 3157, 3166, 111 L. Ed. 2d 666 (1990) ("[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."). See also, Davis v. Alaska, 415 U.S. 308, 319-20, 94 S. Ct. 1105, 1111-12, 39 L. Ed. 2d 347 (1974). We thus look to whether important reasons sufficient to justify the infringement upon the defendant's right to be present at trial existed here.

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9. We have carefully considered and found distinguishable the Court's earlier holding in Raffel v. United States, 271 U.S. 494, 46 S. Ct. 566, 70 L. Ed. 1054 (1926). Raffel held that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his pre-arrest silence. See also Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). The Raffel Court reasoned that, once a defendant takes the stand in his own defense, he is subject to cross-examination on the topic of his pre-arrest silence. As we have already stated, issues raised on cross-examination may implicate constitutional rights less strongly than those raised only in summation. Raffel therefore is less on point than Griffin. It is also unclear whether Raffel principles remain good law. See Grunewald v. United States, 353 U.S. 391, 425-26, 77 S. Ct. 963, 984-85, 1 L. Ed. 2d 931 (1957) (Black, J., concurring) (questioning whether Raffel survives Johnson v. United States, 318 U.S. 189, 196-99, 63 S. Ct. 549, 553-54, 87 L. Ed. 704 (1943)); see also Jenkins, 447 U.S. at 245 n.10, 100 S. Ct. at 2133 n.10 (Stevens, J., concurring) (questioning whether Raffel survives Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)); United States v. Hale, 422 U.S. 171, 175 n.4, 95 S. Ct. 2133, 2136 n.4, 45 L. Ed. 2d 99 (1975) (declining to decide whether Raffel survives Johnson and Griffin.)

The State presents the argument made by the Michigan Supreme Court that such commentary is not improper because it is a fair attack upon a witness's credibility. The Buckey court reasoned that "[o]pportunity and motive to fabricate testimony are permissible areas of inquiry of any witness," Buckey, 378 N.W.2d at 439,[10] and stated that "the argument is perfectly proper comment on credibility." Id.[11] See also, Grilli, 369 N.W.2d at 37 ("[t]he prosecutor was free to argue and attack appellant's credibility.") We next assess whether the prosecutor's need to attack a testifying defendant's credibility is an important reason justifying an infringement of his right to be present at trial.

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10. Even Buckey, however, conceded that "a prosecutor may, [not] in every case, argue that a defendant who has testified has fabricated his testimony merely because he has sat through his trial and heard the evidence. Thus, it cannot be said that every defendant will be faced with a choice between forfeiting one right so that he may exercise another -- e.g., being present at trial, but not testifying so as to avoid the risk of prosecutorial comment that he fabricated testimony." Buckey, 378 N.W.2d at 439. Because, however, the court believed that the evidence in that case did support the prosecutor's inference of perjury, it deemed the remark to be a proper commentary upon credibility.

11. The court further stated: "To accept defendants' argument that they must choose between exercising their right to be present at trial and some other right would be to say that a defendant has the right to fabricate or conform testimony without comment." Buckey, 378 N.W.2d at 439. We disagree. Federal law unequivocally provides that a criminal defendant has no right to perjure himself in his own defense, Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971), and that his attorney may not knowingly permit him to testify falsely, Nix v. Whiteside, 475 U.S. 157, 173, 106 S. Ct. 988, 997, 89 L. Ed. 2d 123 (1986). Nothing in our holding is counter to this principle. It would be somewhat more accurate to say that our holding maintains the opportunity of a defendant to fabricate or conform testimony without comment, an opportunity granted by the Fifth and Sixth Amendments. For that matter, the very existence of the Fifth Amendment and its guarantee that a defendant may testify on his own behalf presents the opportunity of perjury; nevertheless, countervailing principles of criminal justice mandate that we not accept every opportunity to completely eliminate that risk. We decline to restrict a defendant's constitutional rights in order to prevent hypothetical perjury.

We take as the starting point of our analysis the distinction expressed by the Washington State Court of Appeals between a prosecutor's argument that a defendant has tailored his testimony to meet the state's evidence, and her argument that a defendant, by virtue of being present in the courtroom during trial, has gained an opportunity, unavailable to any other witness in the trial, to tailor his testimony to meet the evidence. Compare Johnson, 908 P.2d at 902 (state may not argue that, by virtue of attending trial, defendant has gained unique opportunity to tailor his or her testimony) with State v. Smith, 917 P.2d 1108, 1111-12 (Wa. Ct. App. 1996) (state may argue that defendant has tailored his or her testimony to state's proof). The remarks made in Smith may be permissible commentary upon the defendant's credibility as a witness, while those made in Johnson, centering upon his unique opportunity to fabricate testimony as the only witness able to personally hear all the evidence previously presented to the jury, are not permissible because they amount to nothing more than an attack upon the exercise of rights the Constitution grants criminal defendants.[12] Agard's prosecutor made remarks similar to those in Johnson, so we limit our discussion to such comments and do not reach the Smith-like remarks.

This distinction, as well as that made above between cross-examination questions and summation comments, is relevant to whether the need to dispute the defendant's credibility is so important as to overcome his right to confrontation. In the light of these distinctions, we think that the

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12. Although the Washington Court of Appeals centered upon this point as the critical distinction between Johnson and Smith, Smith, 917 P.2d at 1112, we note a second important distinction: Johnson evaluated summation remarks while Smith examined cross-examination comments.

asserted need to comment upon Agard's credibility carries little weight on these facts. It is perfectly proper for a prosecutor to cross-examine a defendant about those portions of his testimony which have indicia of fabrication. When, however, a prosecutor raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens. Such commentary is not proper comment upon credibility. Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. Such tactics prevent rebuttal and cross-examination, which are the engines of the truth-finding process in an adversarial criminal trial. Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative. They certainly do not provide an important reason for us to cut back on a defendant's exercise of his Sixth Amendment rights.

Our holding does not jeopardize the state's opportunity to attack credibility. If a prosecutor's concern about the defendant's credibility is legitimate, she has readily available alternate means of questioning him. For example, she is free to cross-examine him about discrepancies between his pre-trial account of events and his testimonial account. Having introduced this evidence, she may then remark upon those discrepaneies during her summation.[13] She is also free, of

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13. As mentioned above, however, we are not here stating that it is constitutional for a prosecutor to question the defendant during cross-examination about his unique ability to be present at trial, nor are we stating that she may avoid constitutional problems in summation by first raising the issue of fabrication or presence at trial during cross-examination. These factual circumstances are not before us. We only note that, if the defendant's credibility is truly the point which the state wants to raise with the jury,

course, to point out that he has motive to lie in order to escape incarceration (as Agard's prosecutor in fact did), and to remark upon that motive in summation (as she also did). Only those comments which specifically target and cast suspicion upon the defendant's unique Sixth Amendment right to be present at his trial and hear all testimony are forbidden by the Constitution; those remarks are not simple commentary upon credibility, nor are they necessary to a prosecutor's argument that the defendant lacks credibility, if that argument has a basis in fact and not only in innuendo.[14]

We therefore hold that the prosecutor's summation remarks violated Agard's Sixth Amendment right to confrontation.[15]

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it is possible to raise that issue on both cross and summation without implicating constitutional rights.

14. The dissent asserts that this right is not "unique" because "[d]efendants are present in courtrooms all across the country every working day." The unique right of which we speak, however, is not some right unique to Agard himself, but rather the right to be present at trial, which is a right granted by the Constitution only to criminal defendants and to no other trial witnesses or parties.

15. Whether, as our dissenting colleague asserts, the jurors expect a defendant to be present in court by virtue of "plain common-sense, not the Sixth Amendment," is beside the point. Jurors may draw innumerable conclusions with regard to a defendant's presence, just as they may draw them with regard to a defendant's failure to testify, and there is nothing judges can do about it other than instruct them as to the applicable law. Cf. Griffin, 380 U.S. at 614, 85 S. Ct. at 1232-33. But the Supreme Court has stopped prosecutors from emphasizing the latter fact and implying some wrongdoing from the exercise of these constitutional rights, and we are able to do the same as to the former fact. And this we will do.

It is certainly true that defendants are present in courtroom every day. We hope it is not true that prosecutor's in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free to comment within our jurisdiction.

b. Right to Testify On One's Own Behalf

The Constitution provides a criminal defendant with an implicit right to testify in his own defense. United States v. Dunnigan, 507 U.S. 87, 96, 113 S. Ct. 1111, 1117, 122 L. Ed. 2d 445 (1993); Rock, 483 U.S. at 49, 107 S. Ct. at 2708. That right springs from the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor," U.S. Const. Amend. VI, and is also a "necessary corollary" of the Fifth Amendment's guarantee against compelled testimony. [16] Rock, 483 U.S. at 51-53, 107 S. Ct. at 2708-10.

As noted in the discussion of the defendant's right to be present at trial, the Supreme Court has already held that commentary which chills the defendant's right to testify on his own behalf is unconstitutional. Griffin, 380 U.S. at 615, 85 S. Ct. at 1233. The remarks made by the prosecution here have a similar chilling effect upon the same right by forcing the

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16. "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Although Agard has not relied upon the Fifth Amendment in his appeal to us, we raise the argument sua sponte in order to emphasize the entire framework of this right as set out in the Constitution.

> The interrelationship enumerated rights is significiant . . . The Bill cannot be construed merely taxonomically, as a set of pigeonholes or preconceived rules into which a given factual situation does or does not fit. Rather it must be viewed as a whole; it is an interlocking complex of basic principles of fairness and individual entitlement that carries a continuing meaning applicable to entirely different or changed circumstances.

James L. Oakes, The Proper Role of the Federal Courts in Enforcing the Bill of Rights, 54 N.Y.U. L. Rev. 911, 922 (1979).

defendant to choose between having his testimony viewed without unfair comment or exercising his constitutional rights to testify and to be present at trial. We therefore hold that these summation comments violate a defendant's right to testify on his own behalf and correspondingly the Fifth, Sixth and Fourteenth Amendments.

c. Right to Due Process of Law

In addition to providing a path for the Fifth and Sixth Amendments to attach to state prosecutions, the Fourteenth Amendment guarantees a state criminal defendant due process of law,[17] including a fair trial. In determining whether prosecutorial misconduct during summation amounts to a violation of the Fourteenth Amendment, the Supreme Court has stated that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974)); Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991). See also, United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973) (racially biased summation remarks violated due process rights of defendant). We have previously held that "[w]e must examine the remarks in the context of the entire trial to determine whether the prosecutor's behavior amounted to prejudicial error. In determining whether there is prejudicial error we look at three factors: the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty

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17. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV.

of conviction absent the misconduct." Strouse v. Leonardo, 928 F.2d 548, 557 (2d Cir. 1991); see Bentley v. Scully, 41 F.3d 818, 824 (2d Cir. 1994), cert. denied, 116 S. Ct. 1029, 134 L. Ed. 2d 107 (1996).

In assessing whether Agard's right to due process has been violated, then, we first examine the severity of the prosecutor's misconduct. The State argues that the comments were "brief and isolated" and therefore not severe. See Bentley, 41 F.3d at 825. Yet, the length of the commentary is not automatically decisive. As the late Judge Frank once said, "[improper prosecutorial summation] remarks [have not been deemed] harmless because compressed into a single sentence, for experience teaches that a poisonous suggestion of that kind needs no elaboration." United States v. Antonelli Fireworks Co., 155 F.2d 631, 646 (2d Cir. 1946) (Frank, J. dissenting) (footnote omitted). A comment which directly disparages the defendant's exercise of constitutional rights can be severe misconduct regardless of its length. More important to due process analysis are the nature and effect of the remarks. Under other circumstances, a prosecutor's closing commentary upon a witness' opportunity to fabricate testimony might only implicate state evidentiary law; when the witness in question is the defendant, however, and the commentary goes to the heart of the constitutionally guaranteed rights to be present at trial and testify on one's own behalf, the very fairness of the entire trial is compromised.[18]

Moving on with the three-step analysis, we note that the trial court took no curative measures to correct the prosecutor's error (an unsurprising result, given that he did not find her

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18. See discussion infra regarding Darden, 477 U.S. 168, 106 S. Ct. 2464.

comments to be erroneous). Though it is true that the judge instructed the jury that the lawyer's comments were not evidence and that the jury's recollections of events should control, see Charge at 827, this is a standard jury instruction and was not specifically directed at curing the error nor was it made at the time of the prosecutor's improper remarks.

Finally, we are not at all certain that Agard would have been convicted had the error not occurred. As we have already discussed, credibility was unquestionably the central issue at trial. The fact that the jury convicted only on anal sodomy and not on vaginal rape or oral sodomy indicates that it might have had trouble believing all of Winder's testimony; perhaps, without the prosecutor's summation comments, it would have believed Agard in the entirety. We cannot be certain. Our three-step test therefore indicates that the prosecutor's remarks, unchallenged by the trial judge, did deny Agard a fair trial.

Viewing these comments in the context of the entire trial, we also recognize that prosecutorial commentary which tramples upon a defendant's constitutional rights has been held to implicate the entire fairness of a trial more than non-constitutional error. When rejecting the defendant's due process claim in Darden, the Supreme Court stated that "the prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." Darden, 477 U.S. at 181-82, 106 S. Ct. at 2471-72 (emphasis added). In contrast, Agard's specific rights to testify on his own behalf, to compulsory process, and to confront the witnesses against him were all implicated by the comments we are reviewing. The entire fairness of his trial, and thereby due process, were likewise infringed. We therefore find that Agard's Fourteenth Amendment right to due process of law was violated

by the trial court's error.

2. Harmless Error Review

Having determined that the trial court committed error by permitting the prosecutor's improper summation in violation of Agard's constitutional rights, we now consider whether that error was so harmful as to warrant a grant of Agard's petition for habeas corpus.

a. Standard of Review

In evaluating an application for the writ of habeas corpus, we apply the standard of review enunciated in Brecht v. Abrahamson.[19] In Brecht, the Court held that a conviction may be set aside on collateral habeas review only if the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1721-22, 123 L. Ed. 2d 353 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)).[20] If, however, "grave doubt" exists as to the

19. The Court has recently underlined the differentiation to which it alluded in Brecht and Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264, 113 L. Ed. 2d 302 (1991) between "trial error" and "structural error." See California v. Roy, __ U.S. __, __, 117 S. Ct. 337, 338-39, 136 L. Ed. 2d 266 (1996). "Structural error" is that which is so tenuous as to evade harmless error review, Roy, 117 S. Ct. at 338, while "trial error" is that "which occurred during the presentation of the case to the jury." Fulminante, 499 U.S. at 307, 111 S. Ct. at 1264. The trial court's permitting of improper prosecutorial comments is "trial error" and thus is the proper subject of our review for harmless error.

20. Prior to Brecht, the standard of review for use by federal courts on collateral habeas review was that enunciated in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967), which held that a conviction tainted by constitutional error must be reversed unless the reviewing court could "declare a belief that [the trial

harmfulness of the error, it must be resolved in favor of the habeas petitioner. O'Neal v. McAninch, 513 U.S. 432, 437, 115 S. Ct. 992, 995-96, 130 L. Ed. 2d 947 (1995) ("By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." Id. at 435, 115 S. Ct. at 994.).

b. Application of Standard of Review

Upon evaluating the trial court's error under the Brecht/Kotteakos standard, we are certain that it was harmful. As noted in Part II.B., supra, credibility was the primary issue in Agard's trial, and was what the jury must have assessed most carefully. As to this particular issue, Agard's attorney reiterated on oral argument before the district court:

> . . . the remarks that I am complaining about that the prosecutor made on summation relates (sic) again to the main issue in the case, which is credibility. We have the defendant testifying, which is not typical. And [the prosecutor] makes a big point out of saying to the jury: this is a big advantage this guy got; he got to sit here and listen to all of our witnesses and the luxury of then trying to figure out the best way to get around the damaging testimony they had. So it did implicate his constitutional rights.

error] was harmless beyond a reasonable doubt." Although we have recently commented that Chapman review may occasionally remain appropriate even upon collateral review, Lyons v. Johnson, 99 F.3d 499, 503 (2d Cir. 1996), that issue is not before us on appeal. Moveover, it is no more determinative of the matter at bar than it was in Lyons, because the trial court's error was harmful regardless of which standard is applied. We therefore proceed with Brecht/Kotteakos analysis.

But, again, on the question of prejudice, you know, anything that would cast any unfair suspicion on his credibility in this kind of case has to be considered harmful. . . . It is definitely related to the main theme of this case, which is: who should you believe?

District Court Transcript at 13-14. The prosecutor's improper summation comments directly and negatively affected Agard's credibility, and could single-handedly have been the reason for the jury's decision to believe, contrary to the available medical evidence, Winder's testimony that she was anally sodomized rather than Agard's denial that anal intercourse had taken place that weekend. We therefore find that the error meets the Brecht/Kotteakos standard of harmfulness in that it had a substantial and injurious effect on the jury's verdict.

Conclusion

The prosecutor's improper summation remarks violated numerous constitutional rights guaranteed to state criminal defendants, and were so prejudicial to Agard as to be considered harmful error. We therefore reverse the district court's denial of the writ of habeas corpus. The case is remanded to that court with directions to enter a revised judgment ordering Agard's release after he has served his sentence on the weapons possession conviction, unless the state affords him a new trial within sixty days from the issuance of our mandate. Our mandate shall issue forthwith.

VAN GRAAFEILAND, Circuit Judge, dissenting :

In February 1991, Ray Agard sat in a Queens County courtroom with a jury for ten days while the State of New York prosecuted him for a number of sex-related crimes. Nessa Winder and Breda Keegan were the complaining witnesses. A grand jury had indicted Agard on two counts with respect to Keegan's claims and fourteen counts with respect to Winder's. Three additional counts dealt with the unlawful possession of a revolver. After four days of deliberation, the jury acquitted Agard on both counts involving Keegan and on all the sex abuse counts involving Winder except a count of anal sodomy and a count of assault associated with one of the rape claims, which the trial court subsequently dismissed as repugnant to Agard's acquittal on the pertinent rape claim. The jury convicted Agard on two counts of unlawful possession, but one of the counts was dismissed by the court as duplicitous.

On the appeal of Agard's conviction, the Appellate Division, Second Department, stated that there was "overwhelming evidence of the defendant's guilt" and that the evidence "was legally sufficient to establish the defendant's guilt beyond a reasonable doubt." 199 A.D.2d 401, 402 (1993), leave to appeal denied, 83 N.Y.2d 868 (1994). The Court found "no merit" in the arguments that my colleagues herein advance. Frankly, I don't find any either.

Perhaps a good starting point for my expressions of disagreement with my colleagues is to restate the limited authority that a federal court has in reviewing a petition for habeas corpus relief based upon an asserted state court error. This is described in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), as follows:

> The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow

> one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941).

Id. at 642 (footnote omitted).

It is in the light of these words that we should view Griffin v. California, 380 U.S. 609 (1965), which my colleagues treat as a guiding star for the grant of relief herein. The case of United States v. Hasting, 461 U.S. 499, 508-09 (1983), sets forth the correct weight to be accorded Griffin:

> Soon after Griffin, however, this Court decided Chapman v. California, which involved prosecutorial comment on the defendant's failure to testify in a trial that had been conducted in California before Griffin was decided. The question was whether a Griffin error was per se error requiring automatic reversal or whether the conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. In Chapman this Court affirmatively rejected a per se rule.

After examining the harmless-error rules of the 50 States along with the federal analog, 28 U.S.C. SS 2111, the Chapman Court stated:

> "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S., at 22 (emphasis added).

In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. Brown v. United States, 411 U.S. 223, 231-232 (1973), citing Bruton v. United States, 391 U.S. 123, 135 (1968); cf. Engle v. Isaac, 456 U.S. 107, 133-134 (1982). Chapman reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead 'impregnable citadels of technicality.'" R. Traynor, The Riddle of Harmless Error 14 (1970)(quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A.J. 217, 222 (1925)) (footnote omitted).

I suggest that the following two excerpts from my colleagues' opinions may very well qualify as "impregnable citadels of technicality."

So long as New York prohibits criminal

> defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred.

Winter op. at 2.

> It is certainly true that defendants are present in courtrooms every day. We hope it is not true that prosecutors in courtrooms all across the country are every day commenting upon a criminal defendant's presence at his own trial as though that presence were a license to lie. We intend to ensure that there is never a day on which they are free so to comment within our jurisdiction.

Oakes op. at 40 n.15.

The issue that should be determinative in every case is whether the petitioner had a fair trial. Malley v. Manson, 547 F.2d 25, 28 (2d Cir. 1976), cert. denied, 430 U.S. 918 (1977).

Although both judges and laymen agree that litigants are entitled to a fair trial, they are mistaken if they believe that the concept of fairness had its origin in the United States Constitution. Fairness was recognized as a matter of plain common sense long before the Constitution came into existence. The right of a defendant to be heard has been called one of the "first principles of the social compact and of the right administration of justice," McVeigh v. United States, 78 U.S. 259, 267 (1871), "a principle of natural justice, recognized as such by the common intelligence and conscience of all nations," Windsor v. McVeigh, 93 U.S. 274, 277 (1876). A Latin phrase, the English translation of which is "[h]e who determines any

matter without hearing both sides, though he may have decided right, has not done justice," is attributed to the Roman philosopher, Seneca, who lived some seventeen centuries before the Constitution was written.

A similar principle with "ancient roots" is the right of a defendant to be present in court to confront and cross-examine prosecution witnesses. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970). The defendant's presence "is fundamental to the basic legitimacy of the criminal process," United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983) (per curiam), and is required by the "dictates of humanity," Lewis v. United States, 146 U.S. 370, 372 (1892) (internal quotation marks omitted). Indeed, so strong is the defendant's right to be present that, for a time, the Supreme Court held that it could not be waived. See id. at 373-74; Hopt v. Utah, 110 U.S. 574, 579 (1884). The right to be present has been said to be "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455 (1912). "The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him." Snyder v. Massachusetts, 291 U.S. 97, 136-37 (1934) (Roberts, J., dissenting); see also Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

Today, in both the New York and the federal courts, a defendant not only has the right to be present throughout the trial, he has the duty to be present, subject only to certain limited exceptions. See Fed. R. Crim. P. 43; N.Y. Crim. Proc. L. SSSS 260.20 and 340.50; People v. Winship, 309 N.Y. 311, 313-14 (1955) (per curiam). Jurors are not blind fools, oblivious to the world around them. It is, I believe, safe to say that the jurors, who heard the prosecutor's comments concerning Agard's opportunity to hear the State's witnesses before he himself testified, had seen scores of trials portrayed in the movies and on television or had read about them; and almost

without exception, the defendant was present during each trial. If for no other reason, the defendant is required to be present so that he may be identified. What juror has not felt a tingle as he witnessed the dramatic spectacle of a prosecutor pointing to the defendant and asking the victim "Is this the man who ---?" Like all of us, jurors expect the defendant to be present in court, and, insofar as the lay jury is concerned, that expectation is based on plain common-sense, not the Sixth Amendment. Simply put, how could a defendant dispute the testimony of the prosecution's witnesses if he didn't know what they said?

I believe it is most unfair to the prosecutor in the instant case to hold that she "specifically target[ed] and cast suspicion upon the defendant's unique Sixth Amendment right to be present at his trial and hear all testimony." Oakes op. at 40. There was nothing "unique" about the defendant's presence, and I cannot agree that the prosecutor "cast suspicion" upon it. Defendants are present in courtrooms all across the country every working day. It was obvious to the jurors who sat through the ten-day trial that the defendant also was there and could hear the State's witnesses testify before he offered his own version of the events in question. In view of all of the foregoing, I search in vain for constitutional error in the prosecutor's statement concerning Agard's presence at trial.

My colleagues argue that the prosecutor's comment "invite[d] the jury to consider [Agard's] exercise of his right to confrontation as evidence of guilt, and therefore penalize[d] him for exercising that right." Oakes op. at 33. They say that this comment "impl[ied] that a truthful defendant would have stayed out of the courtroom before testifying." Id. The implication, in other words, is that a truthful defendant would have sequestered himself voluntarily, just as all other witnesses were involuntarily sequestered. The Supreme Court long ago provided the answer to this implication in Geders v. United States, 425 U.S. 80, 88

(1976):

> But the petitioner was not simply a witness; he was also the defendant. A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.

My colleagues' assertion that jurors wouldn't recognize this distinction between defendants and witnesses again belittles the common sense of jurors. In attempting to measure the effect of the prosecutor's statement, I am unable to even visualize a juror rising to his feet in the jury room and saying, "If Agard is innocent, he would not have sat in the courtroom during the entire trial. He would have gone about his business and let his lawyer fend for himself."

As already observed, state appellate courts have a great deal more supervision and control over the conduct of their trial courts than do federal courts passing upon habeas corpus applications by state defendants. It is significant, therefore, that a number of state courts have found no violation of defendants' rights by comments similar to those of the prosecutor in the instant case. For example, in State v. Robinson, 384 A.2d 569,

570 (N.J.Super. Ct. App. Div.) (per curiam), cert. denied, 391 A.2d 498 (N.J. 1978), the prosecutor argued that the defendant "had the ability to sit here and listen to the other witnesses testify." The court rejected the defendant's claim of error with the following language.

> We conclude that the prosecutor's comments did not in any way deprive defendant of his right to confront the witnesses against him or of his right to be present at his trial. Obviously he did confront these witnesses and was present at his trial. And a reasonable reading of the comments clearly reveals that they were a comment on the credibility of defendant's testimony. It is well settled that when a defendant waives his right to remain silent and takes the stand in his own defense, he thereby subjects himself to cross-examination as to the credibility of his story. And that issue would involve whether the story had been fabricated. State v. Kimbrough, 109 N.J.Super. 57, 67, 262 A.2d 232 (App.Div.1970); State v. Burt, 107 N.J.Super. 390, 393, 258 A.2d 711 (App.Div.1969), aff'd o.b. 59 N.J. 156, 279 A.2d 850 (1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 728, 30 L.Ed.2d 735 (1972). Here the issue of defendant's credibility was whether his testimony was tailored to that of the testimony of other witnesses, a perfectly proper inquiry.

The foregoing language was quoted verbatim in People v. Buckey, 378 N.W.2d 432, 438 (Mich. 1985), where the same result was reached.

In Reed v. State, 633 S.W.2d 663, 666 (Tex. Ct. App.

1982), the prosecutor told the jury: "And, you heard from the defendant. You heard the defendant's story. Of course, you got to hear the defendant's story after he had listened to everyone else testify--." The Court of Appeals said the "comment was a reasonable one, not manifestly improper and prejudicial, and did not deprive appellant of a fair trial." See also State v. Howard, 323 N.W.2d 872, 874 (S.D. 1982).

In United States v. Warren, 973 F.2d 1304 (6th Cir. 1992), trial below began on June 7, 1991. The Government made its opening statement on that day, but the defendant did not. The trial then was recessed until June 17 so that the judge could attend a judicial conference, and the recess continued for two more days because of illness of the judge's wife. In the prosecutor's closing argument to the jury, he said:

> I gave my opening argument, tomorrow it will be two weeks ago. The truth hasn't changed since I gave you the original opening argument. The defendant waited to hear our witnesses before coming up with his version of the truth yesterday. But I submit to you I have proven the case against James Henry Warren that I told you I would prove two weeks ago.

Id. at 1307.

The Court of Appeals held there was no error, stating:

> The argument of the prosecuting attorney is nothing more than fair comment on defendant's reservation of his opening statement and his allegedly concocted testimony that he had merely assisted John Williams in the pawning of Williams' pistol. This is the kind of thrust and parry customary in jury argument.

Id.

I must confess that I am baffled by some of my colleagues' arguments. Judge Oakes states, for example, that "[i]t is perfectly proper for a prosecutor to cross-examine a defendant about those portions of his testimony which have indicia of fabrication." Oakes op. at 38. I agree. He then continues, "[w]hen, however, a prosecutor raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens." I have read and reread the prosecutor's statements and I heard neither bells nor sirens. Judge Oakes goes on, "Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments." Id. at 38-39. If the lawyers were not litigating the facts relating to credibility during the course of the trial, I find it difficult to imagine what they were doing. To "fabricate" means to lie. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 811. The specter of fabrication pervaded the trial from its opening day. Winder testified that Agard committed anal sodomy on her; Agard said that he did not. One of them was not telling the truth. My colleague's statement, that the specter of fabrication was raised for the first time on summation and that there were no facts in evidence to support the inference of fabrication, is without basis in the record.

I am troubled by my colleagues' assertion that Agard had no chance to respond to the prosecutor's comments. "The normal function of rebuttal is to explain or rebut evidence offered by the adverse party." United States v. Neary, 733 F.2d 210, 220 (2d Cir. 1984). The Sixth Amendment protects a

defendant's right to confront witnesses, not lawyers. Moreover, judges in both the New York and the federal courts are vested with discretion to reopen a case after the defendant has rested. See People v. Harami, 93 A.D.2d 867, 868 (1983) (mem.); People v. Benham, 160 N.Y. 402, 437 (1899); United States v. Burger, 739 F.2d 805, 809-10 (2d Cir. 1984). If the prosecutor's statements were as improper and as harmful as my colleagues now contend, defense counsel should have requested the trial court for permission to put the defendant back on the witness stand. In view of the lack of merit in the claim of prejudicial error, I doubt that such a request would have been granted. The telling fact is that defense counsel did not make the request.

I am troubled also by Judge Oakes' casual treatment of the trial judge's "standard jury instruction" that comments by the lawyers are not evidence and that the jury's recollection of events should control. "A crucial assumption underlying [the system of trial by jury] is that juries will follow the instructions given them by the trial judge." Parker v. Randolph, 442 U.S. 62, 73 (1979) (quoted with approval in Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985)). "'In the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions.'" Connecticut v. Johnson, 460 U.S. 73, 85 n.14 (1983) (quoting Chief Justice Traynor's monograph on harmless error, supra, at 73-74).

To repeat what I already have said, I believe it is absolutely essential for defendants to be present to hear the comments of the prosecution's witnesses so that they can respond to them and aid in their own defense. See United States v. Gregorio, 497 F.2d 1253, 1259 (4th Cir.), cert. denied, 419 U.S. 1024 (1974). Moreover, every juror with a modicum of common sense must realize that this is so. I find no error, therefore, in the prosecutor's comments about Agard's presence. "[C]onstitutional error occurs only when the prosecutorial

remarks were so prejudicial that they rendered the trial in question fundamentally unfair." Garofolo v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986). Forceful and vigorous argument by a prosecutor is not forbidden if based on the evidence. United States v. Brown, 456 F.2d 293, 295 (2d Cir.) (per curiam), cert. denied, 407 U.S. 910 (1972); United States v. Smith, 778 F.2d 925, 929 (2d Cir. 1985).

It would be a miscarriage of justice to call the state trial fundamentally unfair. My colleagues' discussions of possible inferences that a jury might draw are ingenious but not persuasive. Six state court judges and the district court below found no prejudicial error. Conviction on three counts out of nineteen after four days of deliberation is not very strong evidence of prejudice. Although we are not bound by the statement of the Appellate Division that proof of Agard's guilt was "overwhelming," cases such as Alston v. Redman, 34 F.3d 1237, 1242 (3d Cir. 1994), cert. denied, 115 S. Ct. 1122 (1995), and Tanner v. Vincent, 541 F.2d 932, 937 (2d Cir. 1976), cert. denied, 429 U.S. 1065 (1977), teach us that the following brief statement of facts in that court's opinion must be accorded substantial deference:

> The complainant testified that on May 6, 1990, the defendant held a gun to her head, threatened to kill her, and beat her in the course of forcing her to have anal intercourse by "forcible compulsion." Later at the emergency room of a hospital, the victim was found to have bruises on her arms and legs, a cut lip, and a black eye so seriously battered that she had hemorrhages in it four to five w ks later, as well as floating spots up to the day of trial. In addition, the defendant admitted to owning a gun, which was recovered by the police.

199 A.D.2d at 402.

Miss Winder swore that she was sexually mistreated, and the indisputable facts clearly established that more than a simple amorous tete-a-tete had taken place. She said that she was threatened with a gun, and a gun was found in Agard's possession. Agard's abject apology found on Winder's answering machine the following day was not made without a compelling reason.

When this appeal was argued in our Court, two young women came in, listened to the argument and then left. Although I had no way of knowing who they were, their presence reminded me that, whatever the morals of the two female complainants, they also have rights that courts should recognize.

Winter, Circuit Judge, concurring in the result :

I concur in the result although on somewhat different grounds from those expressed in Judge Oakes's opinion.

With regard to the limitation on appellant's cross examination of Winder, appellant has not shown that any of the various answers that might have been given to the questions at issue would have enhanced his defense in any material respect. In particular, he laid no foundation to show that the questions might shed light on his arguments concerning the lack of physical evidence of trauma.

With regard to the limitation on the testimony of the

defense expert, the question seems close only because of hindsight. We now know of the unusual verdict rendered. In light of that verdict, the ambiguities regarding the use of the words "force" and "forcible" now seem obvious, and the limiting of the cross-examination was an event of considerable magnitude. But it is not error, much less constitutional error, to sustain objections to ambiguous questions.

With regard to the prosecutor's comments on summation, I agree with Judge Oakes that they implicated appellant's rights to be present at trial and to testify. I would, however, expressly limit our holding to the following circumstances.

First, the only evidence supporting the inference that appellant tailored his testimony to the prosecution's case was his presence in the courtroom and that testimony itself. There was, for example, nothing in the record indicating that appellant had earlier given a different version of events and altered that version after learning of the prosecution's evidence. The only support for the inference, therefore, was appellant's exercise of constitutional rights.

Second, the inference suggested by the prosecutor was entirely unfair in that appellant had no chance to anticipate and rebut it by testimony. Under New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements -- that is, evidence that he had told the same story even before witnessing the prosecution's case. See People v. McDaniel, 81 N.Y.2d 10, 16 (1993); People v. McClean, 69 N.Y.2d 426, 428 (1987). So long as New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not

fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred.

Third, the prosecutor's argument was not harmless. The case turned on detailed and conflicting versions of several events given by prosecution witnesses and by the defendant. The prosecution witnesses were present only for their individual testimony while the defendant was present for the entire trial. [21] The accusation that appellant heard the prosecution's case and tailored his testimony to it was, therefore, a powerful argument. It affected none of the witnesses against him, and, as noted, was virtually impossible to rebut directly. The only effective way for appellant to have avoided this unfair but powerful argument would have been either to forego presence at the trial or testifying in his own defense -- important constitutional rights.

I therefore concur in the result.

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21. We may assume for purposes of this matter that our dissenting colleague is correct in concluding that jurors generally expect a criminal defendant to be present in the courtroom during the trial and that remarking upon that presence merely states the obvious. However, the prosecutor's comments here went far beyond remarking upon Agard's presence. They specifically emphasized that other witnesses were not present to hear each others' testimony and that the defendant therefore had a "big advantage" in being able "to sit here and think what I am going to say and ... [h]ow am I going to fit it into the evidence?" I doubt that many jurors are familiar with the practice of excluding witnesses except for their individual testimony. Indeed, courtroom scenes on television or in the movies may require the presence of the important characters for dramatic effect. In my view, therefore, the prosecutor's remarks explored matters far beyond the obvious and had a telling effect.

Agard v. Portuondo

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1996

(Petition for Rehearing

Filed: July 18, 1997 Decided: October 23, 1998)

Docket No. 96-2281

ON PETITION FOR REHEARING BY THE PANEL

RAY AGARD,

Petitioner-Appellant,

- v. -

LEONARD PORTUONDO,

Superintendent of Fishkill Correctional Facility,

Respondent-Appellee.

Before:

WINTER, Chief Judge,

OAKES, and VAN GRAAFEILAND, Circuit Judges.

Petition for rehearing. In earlier opinions, a majority of the panel reversed the denial of a writ of habeas corpus, holding that Agard's constitutional rights were violated when the prosecution implied in closing argument that Agard, by virtue of being present in the courtroom throughout trial, gained the opportunity to fabricate his testimony. See Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997). We narrow the rationale of our ruling in that regard. We also reject appellee's claim, made for the first time in this petition, that Teague v. Lane, 489 U.S. 288 (1989), precludes our ruling. Otherwise, the petition for rehearing is denied.

Judge Van Graafeiland dissents in a separate opinion.

Ellen C. Abbot, Assistant District Attorney, Queens County, Kew Gardens, New York (Richard A. Brown, District Attorney, John M. Castellano, Assistant District Attorney, of counsel), for Respondent-Appellee.

WINTER, Chief Judge:

This is a petition for rehearing challenging the granting of a writ of habeas corpus by the panel majority on the ground that, even if the majority's view of the law is correct, the decision created a "new rule" that cannot be retroactively applied to the petitioner. Teague v. Lane, 489 U.S. 288 (1989).

With respect to the merits, we narrow the rationale of, but do not alter, our prior decision. Upon further reflection, Judge Oakes and I now retreat from any language in our prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony. Although one factual element of such an argument may be the presence of the defendant during the trial, its principal focus is on a comparison of defendant's testimony with the testimony of other witnesses. Such an argument, unlike that made here, depends on what the defendant testified to regarding pertinent events, rather than focussing solely on his presence in the courtroom.

The prosecutor in the present case did something quite different, however, arguing that "unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage, doesn't it." This was not a factual argument based on the defendant's testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony. The prosecutor's argument was not based on the fit between the testimony of the defendant and other witnesses. Rather, it was an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial. See State v. Cassidy, 672 A.2d 899, 908 & n.17 (Conn. 1996) (noting that such argument would not be

objectionable if supported by actual evidence of fabrication or tailoring); State v. Hemingway, 528 A.2d 746, 748 (Vt. 1987) (holding that presenting such argument in conclusory form without evidentiary support was constitutional error). Thus, the constitutional issue here is somewhat similar to that in Griffin v. California, 380 U.S. 609, 613-15 (1965) (disallowing generic argument based on a defendant's exercise of his Fifth Amendment right not to incriminate himself).

Appellee's petition argues, for the first time, that the majority's opinions created a "new rule" that, under Teague v. Lane, 489 U.S. 288 (1989), cannot be retroactively applied. In this circumstance, where the Teague issue was not raised in the district court and raised for the first time in the court of appeals only in the petition for rehearing, we believe that a panel has the discretion not to consider the issue. Teague is not jurisdictional in the sense that a court must invoke it sua sponte where applicable. See Caspari v. Bohlen, 510 U.S. 383, 389 (1994); Ciak v. United States, 59 F.3d 296, 302-03 (2d Cir. 1995) (court need not address Teague argument where government did not raise it in brief or at oral argument). Moreover, the Supreme Court has declined to apply Teague where it was argued for the first time in a case only after certiorari was granted. See Schiro v. Farley, 510 U.S. 222, 228-29 (1994). Teague itself is driven in part by considerations of comity. But comity also calls for representatives of states not to agree to federal courts expending substantial time in addressing the merits of a case, only to argue belatedly that the merits should not have been reached.[22]

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1. Appellee claims that the belated raising of Teague was the result of the difficulty in anticipating the panel majority's decision. However, the issue was raised in explicit terms by Agard. The index to his main brief states that "CERTAIN REMARKS BY THE PROSECUTOR ON SUMMATION . . . INFRINGED UPON HIS

We therefore agree with the Ninth Circuit's holding that Teague issues may, but need not, be addressed when raised only in a petition for rehearing. See Boardman v. Estelle, 957 F.2d 1523, 1534-37 (9th Cir. 1992) (per curiam supplementing opinion) (holding that Teague argument raised for first time in petition for rehearing is considered at discretion of court even though comity interest may be implicated); see also Schiro, 510 U.S. at 228-229 (holding that state can waive Teague argument by failing to make argument in timely fashion); Sinistaj v. Burt, 66 F.3d 804, 805 n.1 (6th Cir. 1995) (respondent waived Teague argument by raising it for first time in motion to amend district court's judgment); Wilmer v. Johnson, 30 F.3d 451, 454-55 (3d Cir. 1994) (respondent waived Teague argument by raising it for first time on appeal in supplemental brief requested by court). And, in this instance, we chose to exercise this discretion. See, e.g., Blankenship v. Johnson, 118 F.3d 312, 316-17 (5th Cir. 1997) (exercising its discretion not to consider a Teague argument); Eaglin v. Welborn, 57 F.3d 496, 499 (7th Cir. 1995) (in banc) (exercising same); Wilmer, 30 F.3d at 455 (same).

We specifically do not address, however, whether other habeas petitioners can take advantage retroactively of a "new rule" when, as here, the panel establishing that rule has exercised its discretion not to entertain a belated Teague claim. We also need not address whether our now-narrowed decision constitutes a "new rule" within the meaning of Teague.

CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL" and the text repeated that claim, stating that the remarks in question, inter alia, "unfairly assailed" his credibility and "concomitantly bolstered" that of the complainant. In light of this, we see no excuse for not arguing Teague, if indeed our adoption of those arguments created a new rule.

We therefore deny the petition.

VAN GRAAFEILAND, Circuit Judge, dissenting:

The original majority opinion herein is reported at 117 F.3d 696. My colleagues now submit a revised opinion, two pages of which deal with the issues discussed in the original opinion. I adhere firmly to my original dissent, reported in 117 F.3d at 716-21, but add this brief response to the arguments that my colleagues now advance.

At the outset, I disagree with the statement in my colleagues' revised opinion that the prosecutor's reference to the defendant's presence in court throughout the trial "was not a factual argument based on the testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." In making this argument, the prosecutor was not disinterestedly discussing "a" defendant. She was challenging the testimony given by "the" defendant in the instant case. She concluded her remarks concerning his testimony when she said:

> He's a smart man. I never said he was stupid ...
> He used everything to his advantage.

The issue in the case was credibility, and conscientious counsel could not avoid discussing it in their summations. For example, Agard's counsel argued to the jury that the prosecution witnesses had fabricated the allegations against Agard and that his testimony was more credible than theirs. See 117 F.3d at 706 n.3. The prosecutor's statements in response were not irrelevantly generic in nature. They were addressed squarely to Agard and his counsel's open-the-door, invite-a-response argument of "fabrication." They did not prejudiciously violate Agard's constitutional rights. See United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998); United States v. Praetorius, 622 F.2d 1054, 1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); People v. Anthony, 24 N.Y.2d 696, 703-04 (1969).

Unlike my colleagues, I find little similarity between the instant case and Griffin v. California, 380 U.S. 609 (1965), which forbids comments about a defendant's failure to testify. The Griffin Court, citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), described such a comment as "a remnant of the `inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws." 380 U.S. 609, 614. The Court continued, "It is a penalty imposed by courts for exercising a constitutional privilege." Id. However, unlike the defendant in Griffin, Agard's presence in the courtroom was not simply the exercise of a constitutional privilege -- it was compliance with a duty that "is one of the earliest established in the criminal law," i.e., the duty of a defendant to be present for trial. See Kivette v. United States, 230 F.2d 749, 755 (5th Cir. 1956), cert. denied, 355 U.S. 935 (1958). In short, while a defendant has the right to be present during his trial, he has no right to be absent. This is the rule in both the New York and federal courts.

Sections 260.20 and 340.50 of New York's Criminal

Procedure Law provide, with certain exceptions not applicable here, that a defendant must be personally present during the trial of an indictment. The New York courts have recognized these provisions as expressions of a "strong social policy in favor of requiring the presence of the defendant," People v. Anderson, 16 N.Y.2d 282, 288 (1965), and have held that "[a] defendant must obtain the permission of the Trial Judge to be absent from a trial," People v. Winship, 309 N.Y. 311, 314 (1955). In the early case of People v. Gardner, 144 N.Y. 119, 127 (1894), the Court said that the defendant "was bound to be in court and in the presence of the jury, the recorder and the witnesses who might be there. The recorder, the jurors and the witnesses had the right to see him, and he had the right to see them." See also People ex rel Lupo v. Fay, 13 N.Y.2d 253, 257 (1963) (defendant's presence is indispensable); People v. Rheubottom, 131 A.D.2d 790 (1987) (mem.) leave to appeal denied, 70 N.Y.2d 716 (1987) (no error in denying defendant's motion to remain outside courtroom); People v. Masselli, 134 Misc.2d 414, 415 (N.Y. Sup. Ct. 1987) (absent effective waiver, defendant's presence at felony trial is indispensable).

Although state, rather than federal law is at issue herein, Fed. R. Crim. P. 43, is very similar to the above-quoted provisions of New York's Criminal Procedure Law and is interpreted in much the same manner. See In re United States, 784 F.2d 1062, 1063 (11th Cir. 1986); United States v. Cannatella, 597 F.2d 27 (2d Cir. 1979) (per curiam); United States v. Moore, 466 F.2d 547, 548 (3d Cir. 1972) (per curiam), cert. denied, 409 U.S. 1111 (1973); United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1970).

Where, as here, a defendant is required by law to be present in court while all the witnesses testify, I can discern no prejudicial constitutional error in a prosecutor's reference to the

so-called "benefits" inherent in such requirement. Such "benefits," which are not of the defendant's doing, must be obvious to every juror with a modicum of common sense. The comment in question herein deals with the issue of a defendant allegedly coloring his testimony to conform with what has gone before. As former Justice Brennan said when discussing this issue in Brooks v. Tennessee, 406 U.S. 605, 611 (1972), "our adversary system reposes judgment of the credibility of all witnesses in the jury." Nothing that the prosecutor said in the instant case concerning Agard's obvious presence in the courtroom prevented the jury from properly exercising this judgment.

With all due respect to my learned colleagues, I must adhere to my dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RAY AGARD,

Petitioner,

JUDGMENT
95-CV-2239 (RR)

-against-

LEONARD PORTUNDO, Superintendent,
Fishkill Correctional Facility,

Respondent.

----------x

An order of Honorable Reena Raggi, United States District Judge, having been filed on March 20, 1996, for the reasons stated at oral argument on March 15, 1996, denying the petition for a writ of habeas corpus and granting a certificate of probable cause to appeal, it is

ORDERED and ADJUDGED that petition take nothing of respondent; that the petition for a writ of habeas corpus is denied; and, that a certificate of probable cause to appeal is

granted.

Dated: Brooklyn, New York
March 21, 1996

ROBERT C. HEINEMANN
Clerk of Court

98-1170 (9)

SUPREME COURT OF THE UNITED STATES

LEONARD PORTUONDO, Superintendent of Fishkill Correctional Facility,

Petitioner,

-against-

RAY AGARD,

Respondent.

October Term 1998
Case No. 98-1170

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PLEASE TAKE NOTICE that respondent Ray Agard, by his attorney, Beverly Van Ness, Esq., respectfully moves for leave to proceed in forma pauperis in connection with the above-captioned petition for certiorari. Mr. Agard was granted leave to proceed in forma pauperis in underlying proceedings both in New York State courts (at trial and throughout his state court appeals) and federal courts on his petition for a writ of habes corpus (in the United States District Court for the Eastern District of New York and in the United States Court of Appeals for the Second Circuit). Ms. Van Ness was assigned to represent Mr. Agard throughout these proceedings, most recently by the Second Circuit Court of Appeals pursuant to the Criminal Justice Act, 18 U.S.C. 3006A et seq., and her appointment is continued for purposes of responding to the instant petition for certiorari.

WHEREFORE, respondent respectfully requests that he be granted leave to proceed in forma pauperis in this Court.

Dated: New York, New York
February 5, 1999

Beverly Van Ness

BEVERLY VAN NESS
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TO: John M. Castellano
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125-01 Queens Boulevard
Kew Gardens, New York 11415

No. 98-1170

SUPREME COURT OF THE UNITED STATES
October Term, 1998

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

-against-

RAY AGARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LEONARD PORTUONDO, Superintendent of Fishkill Correctional Facility,

Petitioner,

-against-

RAY AGARD,

Respondent.

----------X

October Term 1998
No. 98-1170

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On July 3, 1997, the United States Court of Appeals for the Second Circuit granted respondent's petition for a writ of habeas corpus per 28 U.S.C. §2254; the State's petition for rehearing and suggestion for rehearing in banc was denied on October 23, 1998. Petitioner subsequently filed a petition for writ of certiorari with this Court, which was received by respondent's counsel on January 21, 1999. For the reasons which follow, the petition should be denied.

INTRODUCTION

Petitioner has advanced three arguments in support of its petition, including the contention that the Court of Appeals' decision in this case constituted an improper extension of Griffin v. California, 380 U.S. 609 (1965), as amplified in United States v. Robinson, 485 U.S. 25 (1988). On the contrary, the Second Circuit's analysis, in which the prosecutorial comments at issue are reviewed in context and against the backdrop of the evidence

adduced at trial, is entirely consistent with this Court's opinions. Moreover, petitioner's claim that there is a serious "split of authority" which this Court must resolve is greatly overblown. Indeed, there is no conflict at all among the circuits on the prosecutorial misconduct issue, and petitioner can point to only one state court of last resort which is even arguably at odds with the Second Circuit's opinion herein; when that state court decision is examined, in turn, its reasoning is actually in harmony with the Court of Appeals' decision in this case. As also discussed post, the particular form of error raised on respondent's appeal has arisen in very few cases over the years, and the unlikelihood of its recurrence further undercuts petitioner's claim that it is worthy of this Court's review. Finally, the claim that the Second Circuit's opinion has generated "extensive controversy" across the nation -- the final argument advanced by the State in support of its petition -- is so grossly exaggerated as to be reckless.

Respondent also takes issue with petitioner's "Statement of the Case," in principal part because of its portrayal, as fact, of numerous alleged crimes of which respondent was affirmatively acquitted by the jury. A short Statement of the Case is therefore included in this brief, which also covers the proceedings on appeal in state and federal court.

STATEMENT OF THE CASE

The first evening that Nessa Winder met respondent, they

voluntarily engaged in sexual acts and, as Winder described it, had a "great time." The following weekend they again ended up at respondent's house, where Winder soon fell asleep. Her close friend and roommate, Breda Keegan, was also there, and respondent allegedly became enraged, put a gun to her head and threatened to kill her.[1] Some time later, after more threats which Keegan acknowledged she did not report to the other people who were at respondent's house, Keegan left Winder behind and accepted a lift home from respondent's friend, Adolph Kiah. She concededly went to sleep without calling the police, and Kiah testified that Keegan had made no complaints to him about respondent's conduct on the drive home.

Winder, meanwhile, awoke later that morning, and "hopped up" out of bed. When respondent woke up, she told him she was in a rush because her English boyfriend was coming to New York to visit, and she asked respondent to call a cab for her. Instead, for the next several hours according to her, respondent terrorized her with his gun, beat her and committed eight separate acts of forcible rape, oral sodomy and anal sodomy.[2] Respondent finally called for a taxi to take her home -- she had earlier failed to

---

1 Winder had seen the gun, which respondent kept in his closet, the previous weekend.

2 Winder admitted that she scratched respondent's lip with her nails, cutting him, which respondent testified occurred when he put his hands on her shoulders to calm her down after she realized how late it was and remarked "I got to get home. He's [referring to her English friend] going to kill me." Reflexively, in response to the pain the cut caused him, respondent pushed Winder away with the palm of his hand and thereby hit her in the eye.

avail herself of several opportunities to either flee the house or remain in the bathroom, which had a lock -- and she left.

Respondent testified to a far different version of events at trial, and his account was both consistent with the medical evidence and, as to matters of which Kiah had personal knowledge, corroborated by him. Of the 19 counts submitted to the jury, 14 were associated with Winder (including 9 sexual offenses, 1 count of felony assault [no intent to cause injury required] and a charge of second degree weapon's possession [possession with intent to use unlawfully]), and 2 related to Keegan (second degree weapon's possession and menacing); lesser weapons offenses were also submitted.

In her closing remarks, the prosecutor noted that respondent was "the one who had an answer for everything," and "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." Returning to this theme near the end of her summation, the prosecutor argued:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
>
> He's a smart man. I never said he was stupid.... He used everything to his advantage.

When he later unsuccessfully moved for a mistrial based on the prosecutor's summation, defense counsel included "comment[s] on [respondent's] presence at the trial. He has the absolute constitutional right to be here ... It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial."

The jury deliberated for close to four full days, ultimately acquitting respondent of all charges connected to the two complainants save two: felony assault (later dismissed on repugnancy grounds) and sodomy in the first degree (1 of the 2 anal sodomy counts considered). He was also convicted of "simple" possession of a weapon in the third degree, of which he had admitted his guilt. Although respondent, at age 36, had only one prior conviction on his record (for which he received a sentence of probation in 1983) and an extensive educational and employment history, he was sentenced to close to the maximum authorized term for the sodomy conviction, 10 to 20 years in prison.

Respondent raised several issues on his state court appeal, including prosecutorial misconduct on summation: the remarks cited ante had denied him his right to a fair trial and, specifically, had abridged his constitutional right to be present at trial and confront his accusers. He cited New York State Appellate Division cases in his brief, pre-dating his trial, which had held similar remarks to be error. In response, the State argued simply that the comments had been "fair response" to defense counsel's summation, and that any error had, in any event, been harmless (see

petitioner's Appellate Division brief, pp. 54-56).

The Appellate Division modified the judgment by dismissing one of the third degree weapons' possession counts and otherwise affirmed (199 A.D.2d 401, 606 N.Y.S.2d 239 [2nd Dept. 1993]). After leave to appeal was denied by the New York State Court of Appeals (83 N.Y.2d 868 [1994]), respondent filed a petition for writ of habeas corpus limited to the trial errors he had asserted which were of federal constitutional dimension, including the prosecutorial misconduct issue. In response, the State never contended that respondent was seeking to create a new rule of constitutional dimension, of which it had not been on notice at the time of respondent's trial. On the contrary, it again addressed the claim on the merits, arguing "fair response" and, alternatively, that "the prosecutor's summation comment [sic] did not substantially prejudice defendant and thus does not warrant habeas corpus relief" (see petitioner's District Court brief, pp. 53-56).

The District Court found that the petition raised "difficult" issues requiring "careful attention" (DC 14, 24; Pet. App. at 2a, __ [page 24 of transcript not reproduced by petitioner in its appendix]).[3] Far from finding "overwhelming" evidence of guilt as petitioner had argued (petitioner's District Court brief, pp. 36, 45, 52), it recognized that the only "decision for the jury" was

3 "DC" refers to the transcript of oral argument before the District Court and its decision, dated March 15, 1996; the transcript has been included in petitioner's appendix ("Pet. App.").

credibility and that this was "a close case" (DC 14-15, 22; Pet. App. at 2a, 9a). The challenged comments made by the prosecutor on summation "troubled" the court (DC 21; Pet. App. at 8a), as they were "dangerously close to commenting on the exercise of a [constitutional] right" (DC 22, see DC 23: remarks "close ... to the line"; Pet. App. at 8a, 9a). Upon review of the entire summations, however, the court found insufficient prejudice to warrant habeas relief (DC 22-23; Pet. App. at 8a-9a). It did grant a certificate of probable cause sua sponte, however, because of "the seriousness of the issues" (DC 23; Pet. App. at 9a).

In its decision, the District Court had noted that it "ha[d]n't found much federal law on the [prosecutorial misconduct] point"; "[it had] noticed that state courts split somewhat in their evaluation of this kind of comment," however, and cited ten cases that it had reviewed (DC 20-21; Pet. App. at 6a-7a). On respondent's appeal to the Court of Appeals for the Second Circuit, the State did not address these cases or suggest that respondent's prosecutorial misconduct claim was in any way a trail blazer. Instead, as at every other prior stage of the proceeding, it argued only that the "remark [sic] was fair response to argument raised by [respondent] in his summation. Further, even if this remark [sic] was improper, it did not cause [respondent] substantial prejudice" (petitioner's Court of Appeals' brief, p. 46).

The United States Court of Appeals held that the prosecutor's comments on summation were harmful constitutional error, and

remanded the case to the District Court with directions that the writ of habeas corpus be granted (117 F.3d 696 [2nd Cir. 1997]; Pet. App. at 12a, 54a; see, generally, Pet. App. at 36a-54a, incl. harmless error review). It, too, cited decisions from ten state appeals courts which had addressed the issue (there were no federal decisions), the majority of which supported respondent; of the balance, two were found to be of questionable value analytically (Pet. App. at 38a-39a, incl. fn. 5).

Petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was denied on October 23, 1998 (159 F.3d 98 [2nd Cir. 1998]; see Pet. App. at 70a-71a). On the merits, consistent with its earlier opinion, the panel's majority reiterated that it was improper for the prosecutor to make "a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony"; this is what was done at respondent's trial, "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial" (Pet. App. at 72a). For future reference, however, the majority clarified that it was "retreat [ing] from any language" in the prior opinion "suggesting" that it would be error for a prosecutor to make fact-based arguments, grounded on the trial evidence, that a defendant had "used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony" (id. at 72a-73a).

In its petition for rehearing, the State had also argued, for the very first time, that the specific constitutional objection lodged by respondent's attorney at trial, and the federal constitutional analysis subsequently advanced by his counsel throughout four levels of appellate review, constituted a novel position which should not be applied retroactively to respondent's trial under Teague v. Lane, 489 U.S. 288 (1989). Noting its discretion to not consider such a tardily raised procedural claim, citing, inter alia, this Court's decision in Schiro v. Farley, 510 U.S. 222, 228-29 (1994), the Court of Appeals declined to do so (Pet. App. at 73a-74a); considerations of comity "call[] for representatives of states not to agree to federal courts expending substantial time in addressing the merits of a case, only to argue belatedly that the merits should not have been reached" (Pet. App. at 73a).

ARGUMENT AGAINST GRANTING PETITION

In its effort to generate this Court's interest in this case, petitioner first argues that the Court of Appeals' decision constitutes an improper extension of Griffin v. California, 380 U.S. 609 (1965) (Cert. Pet., pp. 11-14). Petitioner acknowledges, however, that the Second Circuit only used Griffin "by analogy" in its opinion (id. at 12) -- the Court never suggested that Griffin compelled a finding that respondent's Sixth Amendment rights were violated (see Pet. App. at 41a-47a). More importantly, contrary to petitioner's contention (Cert. Pet. at 13-14), the Circuit

Court's analysis is entirely consonant with both Griffin and the "narrow" reading of that case advocated in United States v. Robinson, 485 U.S. 25 (1988). For just as this Court has made clear that comments on the defendant's exercise of his constitutional right to remain silent are not forbidden per se, and may, in fact, be entirely appropriate when viewed in context (in Robinson, such remarks were held to constitute fair response to an argument made by defense counsel), the Court of Appeals in this case made the same point with respect to comments on a defendant's exercise of his constitutional right to be present at trial and confront his accusers: far from "creat[ing]" a rigid "rule" as petitioner claims (Cert. Pet. at 13), the Second Circuit made clear that both the propriety and prejudice of such comments depend upon the particular facts of the case. Indeed, in keeping with this long-standing and unremarkable "principle that prosecutorial comment must be examined in context" (Robinson, supra, 485 U.S. at 33), the Court of Appeals specifically noted that remarks concerning the defendant's ability to tailor his testimony by listening to other witnesses before he takes the stand would be permissible if they had evidentiary support (see Pet. App. at 45a-46a, 72a).

Next, petitioner argues that there is a "split in authority" on the propriety of commenting on a defendant's presence at trial which should be resolved by this Court (Cert. Pet., pp. 14-18). The "split" is not among federal courts, however, but among state courts, the majority of which support the ruling of the Court of Appeals in this case (see Pet. App. at 38a-39a, incl. fn. 5).

Moreover, many of the opinions cited by petitioner contain little or no analysis or have inapposite facts, so the issue has by no means been clearly and cogently joined. Even more significant, the paucity of decisions addressing the claim in any fashion demonstrates how rarely it comes up, further undercutting petitioner's contention that it is worthy of this Court's review. Indeed, petitioner can point to only 10 jurisdictions out of 51 (50 states and the District of Columbia) to have even considered the issue, and almost half of the opinions cited are not even from the highest court of the state involved. And, of the six jurisdictions cited in which the issue has been addressed by the appellate court of last resort, only one reached a result contrary to that of the Court of Appeals in this case -- the Supreme Court of Michigan in 1985 (see People v. Buckey, 378 N.W.2d 432). The analysis in Buckey, moreover, is actually in accord with that of the Second Circuit in respondent's case: although finding no error in the specific remarks made by the prosecutor at Buckey's trial, based upon the facts of that particular case, the court expressly noted that

> [w]e do not suggest that a prosecutor may, in every case, argue that a defendant who testifies has fabricated his testimony merely because he has sat through his trial and heard the evidence. Thus, it cannot be said that every defendant will be faced with a choice between forfeiting one right so that he may exercise another - e.g., being present at trial, but not testifying so as to avoid the risk of prosecutorial comment that he fabricated testimony. When, as here, however, the evidence does support that inference, the argument is perfectly proper comment on cred-

ibility.

Buckey, 378 N.W.2d at 439; compare with Court of Appeals' decisions herein, Pet. App. at 46a-47a; 72a-73a).

Not surprisingly given the flimsiness of its argument, petitioner does not attempt to rest on this line of cases to support its claim that the issue is sufficiently important to warrant Supreme Court attention. Instead, it is constrained to collect cases on an entirely different issue in its certiorari petition: cases addressing comments on a defendant's courtroom demeanor (see Cert. Pet., pp. 15-17). Respondent disagrees that that issue "has generated a deep split of authority" (id. at 15), as the holdings of these cases are so fact-specific, but the point is irrelevant and thus not worth debating: the cases petitioner cites, to the extent they contain any meaningful analysis at all, concern whether certain comments on demeanor could be construed as an infringement of the defendant's Fifth Amendment right to remain silent. These cases, in short, have absolutely nothing to do with the issue addressed in respondent's case, nor do the other cases petitioner cites which involve comments which may or may not violate an accused's right to counsel (see Cert. Pet. at 17-18). However interesting these other issues might be as an intellectual matter, this case will not provide a forum to address them, and they accordingly provide no basis on which to grant certiorari.[4]

[4] As for petitioner's related suggestion that this case "presents this Court with an opportunity to adopt a standard for determining the propriety of prosecutorial comment on a defendant's exercise of his constitutional rights" (Cert. Pet., p. 18), it is hard to

Finally, petitioner argues that the Court of Appeals' decision herein has caused "extensive controversy" which "demonstrates the far-reaching national implications of the issue" and thereby "supports granting certiorari" (Cert. Pet. at 18-20). To counsel's knowledge, however, the Court of Appeals' decision on the State's petition for rehearing (which did not modify the majority's prior ruling but rather briefly and simply clarified one point which had already been addressed [see Pet. App. at 72a-73a]), has not been cited once since it was rendered almost four months ago. In fact, petitioner points to only four cases which have cited the Court of Appeals' initial decision in this case, which was published more than 19 months ago; two of those, in turn, are from state courts which had already considered the prosecutorial misconduct issue raised herein before respondent's appeal was decided by the Court of Appeals and had reached the same result (see cases cited in Cert. Pet., pp. 19-20, and compare with list of cases cited in Pet. App. at 38a). The dearth of citations to the Second Circuit's decision herein, which, as previously discussed, concerns a form of prosecutorial misconduct which occurs very infrequently (see pp. 9-10, ante), demonstrates the puffery of petitioner's claim of "extensive controversy," as does the number (four) and content of the other "published com-

imagine what such a "standard" could be short of a bright line rule that either any and all comments on a particular right are permissible or no comments are, ever, under any circumstances -- potential rules which it is highly unlikely this Court would favor and, in fact, inconsistent with the contextual approach used in United States v. Robinson (485 U.S. 25), a case cited by the State in its petition herein (Cert. Pet., pp. 13-14).

mentary" on the case that petitioner cites (Cert. Pet., pp. 19-20): a brief New York Law Journal article reporting the denial of the State's petition for rehearing; a discussion of the case by a law professor in the context of a larger article on tailoring of testimony; a short letter in response to the editor of the Law Journal from a White Plains attorney; and a terse recapitulation of the Second Circuit's holding, without any discussion whatsoever or even comment, in a lengthy Syracuse Law Review article entitled Evidence. There is no question that the Second Circuit's decision was of extreme importance to respondent, who served 8 1/2 years in prison on his minimum sentence of ten years prior to his release, but the issue is decidedly not "of national importance" as petitioner asserts (Cert. Pet. at 18).

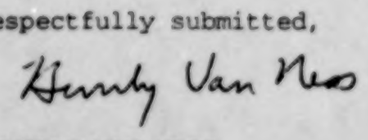
* * *

From the initial briefing of the issue in New York's Appellate Division in 1992 through the habeas proceedings in District Court and then on appeal to the Court of Appeals, petitioner never once took issue with the New York State cases respondent cited, which expressly held that remarks such as made by the prosecutor at respondent's trial were error -- cases which were already on the books before that trial was held. Rather, the State contended only that the prosecutor's comments were fair response to the defense summation and, if error, harmless. Moreover, respondent's trial counsel made the precise constitutional basis of his objections to the prosecutor's summation clear back in 1991, and respondent's appellate lawyer has since used the same federal constitutional analysis on all levels of his state and federal appeals. The State has thus had years, literally, to consider the claim on which respondent's habeas petition was ultimately granted, but it was only after losing in the Court of Appeals, in its petition for rehearing, that the issue's purported novelty was first alleged and the "split of authority" on the point exploited (as noted, the Court of Appeals undertook to review state cases on the issue in its July 1997 opinion, but the District Court had already done this in its decision on the habeas petition, back in March 1996. As a result, petitioner was given prior notice of virtually all the cases in the country which mentioned the issue, but it chose to adhere to its "fair response"/error is harmless themes in its brief to the Court of Appeals). For all the reasons stated, the State's efforts, now, to paint the issue as deserving of this Court's time and resources must fail.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



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February 1999

(3)

No. 98-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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June 7, 1999

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RELEVANT DOCKET ENTRIES

6/5/95	PETITION for a writ of habeas corpus (Queens County); (dg) [Entry date 06/07/95]
6/5/95	MEMORANDUM by Ray Agard in support of [2-1] petition (dg) [Entry date 06/07/95]
6/20/95	ORDER TO SHOW CAUSE: (1) Petitioner is granted leave to proceed in forma pauperis; (2) Attorney General of the State of New York or the District Attorney for Queens County show cause by filing a return, why a writ of habeas corpus should not be issued; (3) within 45 days of the date of this order, respondents shall serve a return. Petitioner with 45 days of receipt of the return shall file his reply. (signed by Judge Reena Raggi 6/13/95) c/m (copies sent by Federal Express to Dennis Vacco, Richard Brown and Petitioner). (fp)
10/10/95	Nicoletta J. Caferri's AFFIDAVIT/MEMO OF LAW in opposition to petition for a writ of habeas corpus. (lg) [Entry date 10/18/95]
11/13/95	REPLY MEMORANDUM OF LAW by Ray Agard in support of Petition for a Writ of Habeas Corpus. (fp) [Entry date 11/15/95]
3/15/96	Calendar entry: Before Judge Raggi on 3/15/96. Argument held on habeas petition; Petition denied; Certificate of probable cause to appeal granted. (fp) [Entry date 03/20/96]
3/20/96	ORDER, denying [2-1] petition for a writ of habeas corpus and a certificate of probable cause

	to appeal is Granted. (Signed by Judge Reena Raggi 3/15/96) c/m (fp)
3/21/96	JUDGMENT for Leonard Portuondo against Ray Agard; The petition for a writ of habeas corpus is denied; and, that a certificate of probable cause to appeal is granted. (signed by Robert C. Heinemann on 3/21/96) c/m (appeals package sent) (fp)
5/28/96	Appellant Ray Agard brief and (joint) appendix received. Problem: need record on appeal. (pr27)
5/28/96	Appellant Ray Agard brief and joint appendix with proof of service filed. (Shelf 59 room 1804). Satisfy appellant's brief due. (pr27)
5/30/96	Record on appeal filed. (Original record of the district court) (State Court Proceedings Incorporated.) (pr27)
6/26/96	Appellee Leonard A. Portuondo brief filed with proof of service. (Shelf 59 room 1804) (pr27)
7/1/96	Appellant Ray Agard reply brief filed with proof of serve. (Shelf 59, room 1804) (pr27)
10/24/96	Case heard before OAKES, VAN GRAAFEILAND, WINTER, C.JJ., (TAPE: 59) (ca91)

7/3/97	Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (JLO) [96-2281] (pr27)
7/3/97	Judge RKW concurring in a separate opinion filed. (pr27)
7/3/97	Judge EVG DISSENTING in a separate opinion filed. (pr27)
7/3/97	Judgment MANDATE ISSUED. (pr27)
7/10/97	MANDATE OF USCA (certified copy) Re: [27-1] appeal. Ordered that the judgment of the District Court is reversed and the case is remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Issued as Mandate 7/3/97. Acknowledgment returned to USCA. Judge notified. USCA 96-2281. (mm)
7/11/97	ORDER, the court grant's Ray Agard's petition for a writ of habeas corpus and orders him released from state custody upon the completion of his sentence for weapons possession unless the State of New York affords him a new trial on the charge of sodomy in the first degree within sixty days of the mandate issue by the Court of Appeals. (signed by Judge Reena Raggi 7/9/97) c/m (fp)
7/15/97	JUDGMENT for Ray Agard against Leonard Portuondo. The Petition for a Writ of Habeas

Corpus is granted; and, that petitioner be released from state custody upon the completion of his sentence for weapons possession unless the State of New York affords him a new trial on the charge of sodomy in the first degree within 60 days of the mandate issued by the Court of Appeals. (signed by Judge Reena Raggi/James Giokas 7/14/97) c/m (copy sent to Mag. Azrack) (fp) [Edit date 7/16/97)

7/17/97 Appellee Leonard A. Portuondo petition for rehearing received. Problem: need additional copies. (pr27)

7/18/97 Appellee Leonard A. Portuondo Petition for rehearing, petition for rehearing in banc [1014632-2] with proof of service filed. (pr27)

7/18/97 MANDATE OF USCA (certified copy) Re: it is ordered that the judgment of the district court is reversed and the case is remanded to the district court for further proceedings in accordance with the opinion of this court. Issued as Mandate 7/3/97. Acknowledgment returned to USCA. Judge notified. USCA #96-2281. (mm) [Entry date 07/21/97]

10/23/98 Petition Opinion FILED DENYING petition for REHEARING [1014632-1] by Appellee Leonard A. Portuondo, endorsed on motion dated 7/18/97, DENYING petition for rehearing in banc [1014632-2] by Appellee Leonard A. Portuondo, endorsed on motion dated 7/18/97. (RKW) (pr24)

10/23/98 Judge Van Graafeiland DISSENTING in a separate opinion filed. (pr24)

2/1/99 Notice of filing petition for writ of certiorari for Appellant Ray Agard dated January 25, 1999 filed. Supreme Court #98-1170. (pr24)

[742] MR. JOHNSON: Good morning, ladies and gentlemen. It is now my opportunity to make a closing argument to you on Mr. Agard's behalf, or summation.

In my summation, what I will do is I will review the evidence in the case and ask you to draw certain inferences and conclusions from the evidence. Before I start, I just want to say to you that in my review of the evidence in the case, it will always be your recollection as to what the evidence was that controls.

You are the judges of the facts in the case, and if there is anything I say that came out of their testimony or any comment I make concerning the evidence that doesn't agree with your recollection, it is your recollection that counts.

I would also ask you, though, if you are not sure, we have had a reporter here throughout the whole trial taking down everything that was said. You have the right to ask for readbacks of anything, any of the testimony in the case. You have [743] the right to request any of the exhibits that were entered in the case. If you are not sure or don't remember something, please, just ask for a readback or ask to see the exhibit.

The second thing I am going to ask you, I am going to make arguments based on the evidence. If you find my arguments to be unreasonable and don't make sense, please reject them, but if the arguments I make based on the evidence in the case do make sense to you, do seem reasonable to you, I ask that you adopt them and bring them with you into the deliberations room.

The first and foremost things that the evidence in this case showed is that Nessa Winder was lying. You need look no further than the medical records in the case to see that. You all heard Miss Winder's story concerning the incident, the long drawn out protracted alleged rape and sodomy, but the medical records don't support that.

Their doctor told you, Dr. Karimi, as well as well Dr. Gilbert, the doctor we presented, they all agreed that the pelvic examination that was done showed absolutely no signs of trauma.

[744] Now, I guess it may be possible that there could have been vaginal intercourse without the woman's consent three times without their being trauma. It's possible. You can use your own common sense. It doesn't seem likely. It doesn't seem reasonable, but the forcible anal intercourse that Nessa Winder described would have left signs.

You heard her describe it. You heard her describe the whole incident. You heard her describe how she was yelling for the landlord, to try to make noise so the landlord would hear. You heard her telling her story about faking the epileptic seizure.

If you believe her story, you would have to believe that there was struggle. If you believe her story.

She also told you, she told you how sore and how much it hurt when this anal intercourse, when she says there was this anal intercourse. Then it happened a second time and it was even longer the second time, and it was very sore and it hurt a lot.

When something like that happens, there would be evidence of it. It is said even the [745] smallest sea gull leaves footprints in the sand if they land on the beach. There are no footprints in the sand in this case.

Now, you may remember that after I cross-examined Miss Winder and I went into the fact when you say Mr. Agard twice, you know, forced you to have anal intercourse and you say it was very sore and you say it hurt a lot, she said yes, yes, yes, but then on redirect she said, well, I didn't struggle, and that was an explanation for why, a supposed explanation for why there were no signs of trauma.

But I ask you to think about it, think it through. Isn't there a difference between -- even if you believe she didn't struggle, which I believe if you listen to her whole testimony concerning the whole incident, it is not consistent with her testimony to believe she didn't struggle, but even if you believe she didn't struggle, there is a difference between not struggling and being relaxed. How many of us just tense up just at the thought of forcible anal entry.

I mean it is not a pleasant thing, but you have to look at that and you have to think about [746] that in determining whether or not there would have been evidence of trauma in the medical records. There would have been. There would have had to have been.

The reason the medical records show Miss Winder was lying is because medical records can't be changed. Medical records are what the medical records are. It's not something she can explain away by saying something happened differently than it did. It is one of the pieces of evidence in the case that cannot be changed by her testimony, and that is why it is one of

the pieces of evidence, the strongest piece of evidence in the case that shows you that she is lying.

Now, I believe Dr. Karimi stated that it would be possible to have anal intercourse without signs of trauma. Now, I ask you to use your own common sense and reason and apply it to the facts as Miss Winder testified, with the sort of situation and facts that she explained.

Is that the sort of situation which there could be anal intercourse without a sign of trauma? I believe not. I believe if you take a reasonable view of how she described this incident, [747] there is no way that she was telling the truth. There would be signs of trauma to the anus. Probably should have been signs of trauma to the vagina as well.

Dr. Karimi said, well, it's possible if less than moderate force was used for there to be no signs of trauma. Once again I ask you to look back on her testimony concerning the whole incident. She claims that she got the black eye because Mr. Agard beat her during this alleged rape and sodomy. Would it make sense that somehow Mr. Agard was rough and physical with his fists as she claims and somehow was gentle when it came to the anal intercourse?

Once again, remember the difference between not struggling and relaxing. There is no way anyone could have relaxed in that situation if it was as she described it, but it wasn't and that is what the medical records shows you.

The medical records, because they can't be changed and can't be explained away, also show other lies of Miss Winder. She claims Mr. Agard hit her in the lip, that her lip was bleeding, that her lip was busted up.

[748] Go through the medical records carefully. Look for anywhere that signs of trauma is noted and you will find only the left eye. You will find nothing concerning the lips.

Look at the People's own evidence, the pictures, 1, 2, and 3, that they like so much shown to show the black and blue eye which is not being contested here; that she had a black and blue eye, but look at her lips. She said her lips was all busted up. There is nothing wrong with her lip. It's not swollen, but if you look carefully, you don't see any crack or anywhere that it was bleeding or could have been cut.

Once again she didn't anticipate the medical records. The medical records can't be changed. The medical records are what shows she was lying.

As to the eye injury itself, once again look at the pictures. No one is contesting that. She definitely had a black and blue eye, but she claims that this injury was caused by Mr. Agard punching her three times.

Is that reasonable? Is that consistent with what is in the picture?

She definitely has a black and blue eye but [749] that is the only injury on her face. Can someone pick out one, two, three spots and hit in the exact same spot? That's not reasonable. That doesn't make sense.

You look at the injury and it is reasonable and it makes sense to believe that it was the product of being struck once. Look at the pictures, please.

Also in the medical records on one of the reports it does note as far as the extremities that -- if I may have a moment -- "Extremities. Multiple bruising over upper and lower extremities. No point tenderness or evidence of fracture," but still further examination of Miss Winder indicates extremities not tender.

Dr. Gilbert explained to you two possible reasons how there could be bruises noted without tenderness. It could be someone who bruises very easily, and I believe he said it was capillaries. I am not going to pretend to remember exactly what the term was, but that a person could bruise without there being any real force used or they could be old bruises.

Are either of those consistent with the [750]story Miss Winder told of the long involved forcible rape and sodomy? No, they are not. These bruises are either old bruises or they were not caused by any real force.

As to her eye and the spots, once again she can claim there were spots. There is nothing we can do to stop her from testifying as to what she wanted to testify to, but look at the medical records. Under "Neurological," "Visual field intact."

Also look at the medical records on the page before that. You see "City Hospital Center at Elmhurst, Doctors instructions to patients." "Return if left eye is still blurry in twenty-four hours."

So, was there ever any evidence, any testimony of her returning? Were there any medical records of any subsequent trips to the hospital, to a doctor? Was there any testimony of anything subsequent?

She didn't go back because her eye wasn't blurry. The spots are something she has added to her story to make it sound good. The visual fields were intact. She didn't return for any treatment. [751] She has no continuing problem with her eye.

She got a black eye and not to belittle that but that is what it was and that is all it was.

I would also like you to think it through and consider the reasonableness of the two different stories. You heard Miss Winder testify and you heard Mr. Agard testify. Is the Doctor Jekyl and Mr. Hyde aspect of Breda Keegan and Nessa Winder's story reasonable? They told you about the first weekend, meeting Mr. Agard, that he was a perfect gentlemen. Miss Winder felt comfortable with him, went back to his apartment, slept with him both literally and figuratively. They got along just fine.

That very first evening Mr. Agard proved himself a gentlemen when he gave Miss Winder's friend his phone number so that she could call and let Miss Winder know she had gotten home safely. Are those the actions of a man who was going to turn around the next week and do all these outrageous things? People with guns and force himself upon a woman? It is not consistent. It doesn't make sense.

It also doesn't make sense if you look at [752] Nessa Winder and Breda Keegan's story together. Somehow they would have you believe that Mr. Agard went off and lost control and he took out the gun and he threatened Breda Keegan, and then she leaves and he goes to sleep, wakes up approximately three hours later and goes off again. I mean that is really Doctor Jekyl and Mr. Hyde. It doesn't make sense.

If he had in fact threatened Miss Keegan, which the evidence shows he did not because of her actions -- I'll get to that in a minute -- but if he had in fact threatened her, wouldn't there have been a rape that evening? Does someone go off into this mad rage as he would have, as Miss Keegan claims, and then goes to sleep and get up and go back into it? It's not reasonable. It doesn't make sense. It is not consistent.

Now, we all talked in voir dire about the fact that because a woman has slept with a man doesn't mean she does not have the right to say no to him at any time and place, and no one has ever contested that.

I am going to ask you to look at the fact that they did have consensual sex, even admitted [753] by Miss Winder, the week before, not for the purpose of saying that she didn't have the right to say no anymore but to determine in your mind whether or not she did say no the next weekend.

I ask you to think of this. If she had said no, in the position Mr. Agard was in, would there have been any need to, you know, suddenly force himself upon the woman to go into a violent rage, take out a gun and threaten her and over a period of three or four hours rape her and sodomize her? Even if she had said no that morning -- which I don't think the evidence supports -- he would have no reason to believe that in time Miss Winder would not want to have consensual sex with him again. They met the weekend before. She came back. There was a mutual sexual attraction. They had sex. They both seemed to enjoy it.

She came back to his apartment the next Saturday night. If she had said no that morning, is there any reason Mr. Agard wouldn't have had to believe that she wouldn't in time decide

that she wanted to have sex with him again? There would have been no reason for him to turn into Mr. Hyde.

[754] Wasn't Mr. Agard's testimony concerning what happened a more reasonable and natural extension of the relationship that started the weekend before? Isn't it consistent? Isn't it the more natural extension of a relationship that began? They have a mutual sexual attraction. They have sex. They like each other. They are becoming friends.

She comes back to his apartment the next weekend, falls asleep. He goes to sleep with her. They wake up in the morning and make love and fall back to sleep again.

Isn't that a more natural extension of the relationship that had begun the weekend before? Rather than the Dr. Jekyl-Mr. Hyde aspect of the complaining witness'-story.

They fall back to sleep. They wake up again sometime around one o'clock. This is when Miss Winder realizes, gee, it's one o'clock the next day. I have now been out late. I have been out all night. My boyfriend from London or England or wherever she says he was from is in town. How am I going to explain this?

Again after that there is the incident Mr. [755] Agard described. She was very upset. She didn't know how she was going to explain this. She wanted to get back. What is she going to say to her boyfriend.

He puts his arms on her to calm her down. She turns, slaps him, comes down and her fingernail catches him inside the lip. Okay. Perhaps a man, you know, should never strike a woman, but reactively Mr. Agard did, but it wasn't three

punches in the face. The pictures don't bear that out. The medical records don't bear that out.

You can see from the pictures that it was one strike (demonstrating).

Then look at Miss Winder's position. She not only has to explain the way being out all night, not coming late but definitely having been out all night. I mean this is the afternoon of the next day, and now she has redness or a black and blue eye or is going to have a black and blue eye. The black and blue takes time to come out. How is she going to explain that away? She doesn't know.

She gets in the cab. She can't go back to see her boyfriend right away because she doesn't [756] know how she is going to explain this. So she gets out and she calls her best friend Breda Keegan to come out to Queens. They talk it over and they go to the police and they cry rape. Nessa Winder cries rape.

Nessa Winder also told you that she doesn't remember anything after leaving The Cave that night, and she was too intoxicated to remember. Yet she was able to describe what happened to Detective Giardina in the hospital.

Now, I know Detective Giardina went to some efforts to explain a way, well, that maybe wasn't Miss Winder who was telling him these things. Maybe it was Miss Keegan. They both were there, but when I asked the detective isn't it a fact you drew up two reports -- "Yes." One of the interview with Miss Winder and one of the interview with Miss Keegan, separate reports? "Yes."

Isn't it a fact you put in the report of your interview with Miss Winder that Miss Winder told you they stayed in The Cave until about three o'clock? That Miss Winder explained that they left to try to get into another bar? That Miss Winder explained that they did not gain admittance [757] and that they went to a local bar? And, most telling, the detective had to admit that he put in his report Miss Winder said she was intoxicated but she remembers getting into the car with Ray, Freddy, Dee and Breda and going back to Ray's apartment.

Could Breda Keegan have possibly told the detective what Nessa Winder remembers? No. And that was the language the detective used in the report. He admitted to that. Nessa Winder was telling the detective what happened after they left The Cave that night.

She did not want to tell you that she remembered what happened because she did not want to have to own up to the fact that she had insisted upon going there. She wanted to go back to Ray's apartment that night. That she had in fact insisted upon it. That her friend Breda was reluctant but it had been her idea.

She wanted to go back and she wanted to spend the night with Mr. Agard. She did not want to have to own up to that. She did not want to have to admit that to you people because it did not fit into her story. So, when it came to her testimony [758] in court here, she doesn't remember any of it.

Well, that is not true and the detective's testimony shows that is not true.

Miss Winder told a rather effective story. I mean you sat here and you listened and certain parts you couldn't help but go (gesturing), but what she told you was a story. It was a script.

Now, she admits she made notes of the indictment. She explained, well, just in my diary, but this was not a diary that someone writes and keeps under their bed and never looks at it again until they write the next day's entries. This sort of occurrence that she described, if it had been true, is the kind of thing women spend their lives trying to forget. Yet she brings these notes with her to the Grand Jury.

She told us she had them at the Grand Jury. I asked her, well, when was the last time you reviewed them. She said the Saturday night before she testified.

Is it really the sort of thing that someone needs to review their notes for or is it the sort of thing a person would like to but can't forget? If it happened she wouldn't have had notes. She [759]wouldn't have needed notes. She wouldn't have used notes. Her story was scripted.

I believe I told you in the opening statement that a good or an effective lie often mixes in elements of truth, and Miss Winder's script was effective. She took all the sex that they had the first weekend, added it to all the sex the second weekend,. threw in the gun that she had found in Mr. Agard's closet, claims he forced her and that was the bottom line basis of her story.

That they had sex, some sex, Mr. Agard never denied, but that morning he told you they had had only vaginal sex. She described the long, drawn out incident with the anal and oral -- oral, anal, oral -- well, you heard the testimony. You can have

it read back if you need the order of things. Yet the Vitullo Kit showed positive for spermatozoa only on the vaginal slides. Consistent with what Mr. Agard told you happened. That they woke up in the morning as, you know, lovers or people with sexual attraction will often do, make love in the morning, and it's probably not that unusual that they also then rolled over and go back to sleep.

[760] The results of the Vitullo Kit are consistent with what Mr. Agard told you happened. They are not consistent with what Miss Winder told you happened. There was absolutely no signs of any spermatozola in the anus or the mouth.

I ask you whether it is feasible that there would have been an absolute none. I don't believe that's reasonable.

There was one other thing in Miss Winder's story that she told you that I must comment on. When she told you about how Mr. Agard's penis tasted after allegedly he had entered her anus, I think everyone in the courtroom kind of went (gesturing) and if that had actually happened, we would very well be justified in going (gesturing), but it never happened.

The medical records show you there was never any anal entry. The medical records show you she is lying about that.

Once the medical records show you that she's lying about that, the fact that she told you that shows you what kind of liar she is; that she thought this all through. Maybe she drew from experience. Maybe she just thought it through what [761] it would be like if it had happened the way I am saying it happened.

The medical records show you. Look at them. They show you she is lying about the anal intercourse or there would have been signs of trauma. There would have been signs of trauma in the vagina even with three times forcible intercourse, but certainly in the anus, and what she told you about that shows you what kind of liar she was.

There is one other thing I would ask you to look at in the medical records. This special report form for sexual assault cases. Dr. Karimi told you that he was called in -- he wasn't the emergency room physician. He was called in especially because there was an allegation of a sexual assault; that he filled out this form, and doesn't it make sense that it filling out this form, he's going to be looking for all the signs of things that would support the claim? Not only is the pelvic examination "no evidence of trauma," then the symbol for negative finding concerning everything else including the rectal-vaginal, but the physical examination which has in parenthesis "include all details of trauma" and then [762] there is nothing else noted but the injury to the eye.

If there had been a busted up lip or if there had been bruises that were consistent with sexual assault, wouldn't this doctor who is called in to do this type of examination have noted that? Wouldn't the doctor have noted that on the form, especially where it says in parenthesis "include all details of trauma?"

I believe he did. It's up to you to decide whether that is reasonable and consistent.

Breda Keegas was also lying and it's not so much through the medical records you can see that but her own actions belie her words. What she told you she did is not

consistent with -- it contradicts what she told you happened. She described Mr. Agard threatening her with the gun and grabbing her around the neck during this period when -- excuse me -- Mr. Kiah and Freddy went to get the beer, but what happens when Mr. Kiah and Freddy come back? Does she immediately go, "Oh, good, other people are here, let me get out of here?" No. She didn't immediately leave.

First I believe she told you that she then [763] took Mr. Agard into a separate room. Would a woman now want to go and be alone in a separate room with someone who had done what she said he did? Is that consistent? Is that reasonable? I think not.

Then she said, well, I wasn't sure whether I wanted to leave at that point. Wouldn't you want to get out of there?

I asked her when you were going to get a ride home with Mr. Kiah, did you ask him to help you take Nessa out? "No." Would any friend, no less than a good friend as they were, eight years friends, they were schoolmates in Ireland and they are living together over here in the United States, would any friend leave another friend in that situation? If in fact Mr. Agard had in fact threatened her with a gun and grabbed her around the neck, wouldn't you do anything you could to get your friend out of there? Does it make sense? Is it reasonable? No.

What does she do when Mr. Kiah took her home? First Mr. Kiah told you she never told him that Mr. Agard had threatened her in any way or that Mr. Agard had taken out a gun. She gets home, she goes to sleep. Maybe she was tired, fine, but would you just go to sleep if that had happened to you

and [764] your friend was still in that apartment? Wouldn't you do something? Wouldn't you go to the police?

Now, think if it's reasonable and consistent as Mr. Agard explained it to you. Breda and Nessa were out together. Nessa wanted to go back to Queens to Mr. Agard's apartment. Breda was pretty luke warm on the idea, but Nessa convinced her and what happens when they get all the way back to Queens? Nessa falls asleep.

There is Breda left out there in Queens not crazy about going there in the first place and now her friend is not even awake to be hanging out with her. Is it reasonable that someone in that position is going to want to leave, and if they had been out drinking is going to a little loud about it? "I can't believe my friend dragged me out here. Here I am out in Queens. I want to be home. It's late. She's asleep."

Is it reasonable that someone may raise their voice a little, especially if they have been drinking, and make some noise? Is it reasonable that someone who lived in an apartment such as Mr. Agard as was described to you, just rooms and a common area, would then say to his friend, you know, [765] "Adolph" -- or "Dee, can you take her home?" and he does that. Is that reasonable and consistent? Yes.

Are her allegations of what Mr. Agard did consistent with just leaving her friend there and not going to the police? No.

You also heard from Mr. Kiah. Mr. Kiah, I mean he was straight forward. He didn't pretend to know what he didn't know. The District Attorney asked him you were there the next

day, you don't what happened, and he said no, I don't. I wasn't there.

He's kind of a quiet guy but I mean it's up to you to judge the credibility of the witnesses and determine if you thought he was a straight forward person just telling what had happened, and you listened to him, you heard him. It will be up to you to determine, but he did tell you that that evening Nessa Winder wasn't asleep in the car when they left The Cave, that she was in fact on Mr. Agard's lap because they were all cramped into his car and that they were being affectionate.

Is that consistent with the relationship that had developed the week before? Yes.

[766] He also told you that she came into the bar with him, that local bar, and they had drinks, and that they were all talking. She wasn't asleep. She wasn't blacked out and that when she came in the car in fact she was intent on coming back to Mr. Agard's apartment.

He also told you contrary to what Breda Keegan would have you believe that she never told him that Mr. Agard threatened her with a gun, and that is about all that he told us because that's about all he was there for. He didn't try to tell you things he didn't know. He didn't try to remember things he couldn't remember.

It's up for you to judge his credibility.

I talked to you in my opening statement about how certain evidence can be viewed differently depending on whether you start with a presumption of guilt or whether you afford Mr. Agard the presumption of innocence that he is entitled to. I

think a very interesting and very important piece of evidence in this case is the tape recorded phone message. You heard it and you saw the transcript, I believe it's in evidence. You can ask for it to be played back to you, but if you don't [767] start with a presumption of guilt, if you don't say to yourself, well, Nessa Winder said he did it and so this must be an admission, some sort of confession apologizing for that terrible thing he did, or you can afford Mr. Agard the presumption of innocence and scratch the surface and say, well, wait a minute, what would a call and apologize for. Does a person call and apologize for an extended rape, forcible rape-sodomy over a three to four hour period? Is that something a person can possibly apologize for or could a man apologize to a woman because he struck her whether it was reactively or not, and can a man feel bad for having struck a woman upon reflection the next day and call and apologize for it.

Listen to some of the words. He says it was all my fault. Now, in order to say that, there would have had to have been a question of whose fault it was. Is there any question of fault in a long extended rape-sodomy? No. There is no question of fault with threat with a gun and force is used. There is no question of fault there. No one would say that was my fault. There is no question about it.

[768] There could be a question of fault where a woman scratched at a man and he hit her and upon reflection him saying "Yes, that was my fault that I did that."

Do you apologize for a long extended rape-sodomy? No. Do you say it was your fault? No.

Do you apologize for striking a woman? Yes. Do you say that was your fault, whatever the circumstances? Yes. That is reasonable.

There were also some things the prosecution brought out when they cross-examined Mr. Agard, that he had once driven without a license, that he had left his felony conviction off his job applications. If you had just met someone at a party or wherever and they told you I once drove without a license or I once left -- I have a felony conviction and I left it off a couple of my job applications when I was trying to get a job, would you go "oh my goodness, what a horrendous person?" No. If you don't start with a presumption of guilt here, you won't be depressed with such things in judging the facts of this case. Those things have nothing with the facts of this case unless you are presuming Mr. Agard guilty to [769] begin with, those things should not impress you at all.

There a number of gun charges in the case, possession of weapon charges. I ask you, please listen carefully to the Judge's instructions on the gun charges. There are counts there charging use or possession of the weapon with intent to use against someone else. That is not true.

There are counts there alleging use during the commission of a crime. That is not true either. That gun sat in Mr. Agard's closet. Nessa Winder found it and played with it, was fascinated by it the first weekend, and if not for her lies about what happened the subsequent weekend, that gun would probably still just be sitting unloaded in Mr. Agard's closet. There was never any use of that weapon against anyone else. There was never any intent to use it against anyone else. There was never any possession of it during the commission of a crime.

Listen carefully to the elements of all the charges related to the gun, and be careful. Yes, he had the gun but because he had the gun, don't convict him of something that he is not guilty of. [770] Listen to the elements. It was simple possession. It was in his closet. There were no bullets in the gun.

There are also assault charges in the case, and no matter how you feel about it, that a man should never strike a woman -- and I think the phone message shows you that Mr. Agard would agree with you for feeling that a man should never strike a woman -- but the fact that it may be wrong doesn't make it criminal.

Listen to the Judge's instructions with regard to any of the assault charges. It is required that the People prove beyond a reasonable doubt that Mr. Agard had an intent to injure Nessa Winder. If he reacted reactively, if that's not redundant, if he just reacted because he had a fingernail dug in his lip, he never formed an intention to injure anyone.

It may be regrettable but it wasn't criminal.

I believe there is also unlawful imprisonment charges. Those I believe I have covered with my discussion of whether or not it is reasonable to believe what Breda Keegan told you and what Nessa Winder told you. I am not going to go through that [771] all again.

Listen carefully to the elements and you will find that those elements have not been proved beyond a reasonable doubt either.

Now, it is part of my job in my closing argument here to try and anticipate as best I can some of the arguments that the

prosecution will be making to you. I of course -- if I suggest things and the prosecution doesn't argue them, then I am simply wrong in my anticipation. I'm sure I won't anticipate everything but there are a few things I would like to comment on with you.

The prosecution may very well talk about the long drawn out incident, but, remember, the question is not whether a forcible rape-sodomy is a terrible thing. No one here will deny that. The question is whether or not it happened here.

Don't convict a man because of the nature of the charges against him when the quality of the evidence against him simply is not there. Don't be affected by the recitation of Nessa Winder's story again when the evidence shows that they have not proved that is true.

Once again, if it is suggested to you that [772] somehow the lack of trauma can be explained away because she didn't struggle because she was scared, was her testimony as a whole concerning this incident consistent with her not struggling, or was her testimony consistent with her trying to tell you she did struggle and once again, the difference between not struggling and being able to relax.

I don't see how anyhow can possibly find tha a woman would be able to relax her anus in that situation. It is just not reasonable, it is not believable.

That Nessa Winder I believe told you -- well, she continued her relationship with Mr. Agard because she wanted to be just friends with him. Nessa Winder didn't even know Mr. Agard's last name at the time she went to the police. Is that consistent with someone who is, you know, looking to develop a friendly relationship or is that consistent with someone who

first had a mutual sexual attraction and then finds, well, maybe a friendship is going to develop out of that.

Miss Keegan, I believe, tried to explain away her actions of going home and going to sleep, that she didn't feel Nessa was in any danger. Is that [773] consistent with what she told you happened while she was there? Is it possible that you could be there with a good friend of yours and the person that you leave her with had threatened you with a gun and grabbed you around the neck and been out of control? Is it possible you could leave a friend behind and say, "Well, she's not in any danger"? Is that reasonable? Is it consistent? No.

Now, this will be my last opportunity to speak with you on Mr. Agard's behalf. I will not get to respond to what the prosecution argues to you in their summation. I have not gotten to take notes on what -- I will not get to take any notes on what the prosecution argues in their summation. I will not get to respond.

They will have the last word but I ask you, please, you have been here through the whole trial from day one. I would hope by now that you have some understanding of what the defense's contentions are in this case, and when you listen to what the prosecution argues to you, since I cannot, I am going to have to ask you in your minds to think how would the defense respond to that.

Rape is all too easy of a charge for a woman [774] to allege.

MS. MULLANEY: Objection.

THE COURT: Sustained.

MR. JOHNSON: Under the circumstances as described in this case where it is only the two people alone together, it becomes all too easy for a person to lie.

Mr. Agard has been caught in the trap of Miss Winder's lies. Evaluate the evidence. Don't just be accepting. Scrutinize it. Make an actual determination of whether this case has been proved to you beyond a reasonable doubt. Don't just accept. Set Mr. Agard free from that trap. Do not convict a man simply because of the nature of the charges against him when the prosecution has not proven that those charges are true. Certainly has not proven them beyond a reasonable doubt which is the standard in an American court of law as the Judge will explain to you.

When you do that, if you actually look into the evidence, if this case was not over for you after Nessa Winder testified, if you stuck around to listen to everything else, you will find the prosecution has not proven their case to you [775] beyond a reasonable doubt and I would ask you to return a verdict of not guilty on all the charges.

Thank you very much.

THE COURT: Thank you, Mr. Johnson.
Ms. Mullaney.

MS. MULLANEY: May it please the Court, Madam Forelady and ladies and gentlemen of the jury, in a short while after I have finished speaking with you, the Judge is going to charge you on the law, and at that point you are going to begin your deliberations in this case. You are going to begin your real function in this case.

When you come back with the verdict in this case, you are going to be telling us what you believe, each of you believes to be the truth in this case. It is your duty to take all of the evidence in this case, all of the testimony in this case and put it all together and to decide this case in accordance with your conscience.

I submit to you that if you use your common sense, your life experience and you evaluate all of the testimony that you heard in this courtroom, there is only one verdict. It's very easy. It's very simple. The defendant is guilty of all of [776] these crimes beyond a reasonable doubt. Not beyond all doubt, not beyond a shadow of a doubt but beyond a reasonable doubt, the standard that the People are required to prove.

Ladies and gentlemen, I ask you to take all of the testimony in this case. I ask you to rely on the testimony of Nessa, of Breda, to use all of the evidence in this case, all of the evidence which supports and corroborates what they told you here.

I ask you to take into this jury room all of these photographs. I ask you to take into that jury room this tape and play it again. I ask you to take into the jury room this Vitullo Kit. I ask you to take into the jury room these medical records.

I ask you to take this gun into the jury room with you, and I ask you to use all of that evidence in evaluating this case. Most of all I ask you to take this photograph into the jury room, and I ask you to compare this photograph, the defendant in this case, Ray Agard, with these photographs of this victim because, you know what Mr. Johnson wants you to believe here, ladies and gentlemen? [777] He wants you to believe there is a victim here.

Mr. JOHNSON: Objection, your Honor.

MS. MULLANEY: He wants you to believe that that man is the victim here.

MR. JOHNSON: Objection.

THE COURT: Overruled.

MS. MULLANEY: The victim of all the lies of Nessa Winder and Breda Keegan.

When you take a look at the photographs here, you take a look, ladies and gentlemen, at the evidence and you tell me who is the victim in this case.

He has tried to raise some doubt in your minds, any doubt. No reasonable doubt. He wants you to speculate. He is telling you that those complaining witnesses were lying.

What evidence do you have before you in this court that those complaining witnesses lied to you? What he wants you to do, instead of relying on the testimony of Nessa Winder and Breda Keegan, is to put all of that aside. Forget her demeanor. Forget the way they testified. Forget all of that emotion, all that feeling, all those tears, all of that pain.

[778] MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: (Continuing) That you saw on that witness stand and instead, ladies and gentlemen, Mr. Johnson tells you forget about it. Just forget about it.

MR. JOHNSON: Objection, your Honor. This is not a view of the evidence. It is comment on me.

THE COURT: Overruled. Fair comment under the circumstances.

Go on.

MS. MULLANEY: (Continuing) Forget about all of the tears, all of that pain and rely on the testimony of this man. Rely on his word, rely on his version of the story, the accomplished liar, the one with the felony conviction.

You didn't hear anything like that about the complainants, did you? No history of lying in their backgrounds. No felony conviction in their backgrounds, but Mr. Johnson says disregard everything they say. Liar, liar, liar. Rely on my client, his word is as good as gold here.

Ladies and gentlemen, we discussed life styles and we discussed behavior on voir dire and [779] in the opening in this case. We went through an awful lot about that and I asked each of you, I believe, how you felt about a woman who met a man on the first night and went home and had sex with him. I asked you if you could judge credibility rather than judging whether or not you liked someone or whether or not you agreed with their lifestyle, and I am not here telling you that I agree with Nessa Winder's lifestyle or Breda Keegan's lifestyle, or that I approve of going out and meeting a man and going home and having sex with him, and I am not asking any of you to do that.

I am not telling you that she was raised in a convent or she lives the life of a nun. I am not asking you to agree with her actions, but just because they put themselves in a bad situation, just because they put themselves in a dangerous situation

doesn't mean that he is excused or he is not guilty, and if any of you, any of you end your consideration of this case with "I don't like them," or "they shouldn't have been there," you are not doing your jobs.

It is not your job here to judge them or [780] their lifestyles. It is not your job to decide if you like them or not. You are here to decide if he is guilty, if he took advantage of them, if he raped, sodomized Nessa Winder.

I ask you, ladies and gentlemen, what did they try to hide from you? What did they try to hide from you? They came in here and they testified. Nessa told you she was drinking. Nessa told you that she was intoxicated. Nessa told you that she used drugs. Nessa told you that she passed out. Nessa told you that she met a man and on the first time that she met him -- not even on a date -- she went ho[illegible]nd slept with that man and she didn't even know his last n[illegible]e.

Did any of you as she testified here get the feeling that she was hiding anything from you? Did she try to make herself look better than she was? Did she try to make herself any different than what she was?

She told you how she met him. She told you how she spent the weekend with him. She told you that they had a good time together. What reason did she have to suspect the difference in the man the following weekend?

[781] She told you that she was drunk that night. She told you that she passed out. She told you that she doesn't remember what happened from the time she left The Cave until the time she woke up at the defendant's house.

What was she trying to hide from you? Anything? Anything at all?

She recalls very well what happened when she woke up, and she told you clearly about that in detail, and if you recall the testimony of the doctor and also Detective Giardina, they both told you that when they spoke to Nessa Winder she did not appear to be intoxicated and she was coherent. She was able to describe what had happened to her.

What she woke up to on the morning of May 6, 1990 was a very different man from the man she was used to, and I submit to you, ladies and gentlemen, that the man that you met on the stand is the smooth man, the slick man, the charming man that Nessa Winder met the first weekend. We didn't get to see the other Ray. He didn't make an appearance in this courtroom.

She recalls what happened that morning. She woke up and she was mad, and why was she mad? Well, [782] ladies and gentlemen, we don't know but I can ask you to think about it. He had met Nessa Winder the prior weekend. She had told him that they could be friends. He seemed interested in Breda Keegan.

You heard from the defendant himself. You heard from Breda and you heard from Nessa that all of a sudden he wasn't calling to speak to Nessa anymore. He was calling to speak to Breda. He was calling to make dinner plans with Breda, not Nessa. You heard that from the defendant himself.

I submit to you, ladies and gentlemen, that what happened on that Saturday night was the defendant was angry. His plans hadn't gone as he expected. He was interested in Breda that night and Breda wasn't interested in him, and he was

angry about that. He was angry when you heard the defendant tell you that she wanted to go home, that she was agitated, that she was nervous, and that she kept saying, "I want to go home and I want to take Nessa with me." That is when he pulled the gun on her while Nessa was still sleeping.

Perhaps because she screamed, perhaps because [783] she caused a big disturbance, he let her go, and, yes, ladies and gentlemen, she didn't call the police. That's never been contested, and I told you from the beginning that was a mistake. There were a lot of mistakes that Nessa and Breda made in this case.

Just because they made mistakes doesn't mean that he is not guilty, and, so, what happened when Nessa woke up? Well, she woke up to this furious man. We don't know what he did during those three hours. We don't know if he was awake or asleep, but what we do know is something very interesting. We know that when Breda left Nessa was fully dressed, but when Nessa woke up, her clothes were off.

So, who took those clothes off and what was the defendant doing while she was sleeping? We don't know. What we do know is when she woke up he was angry. He was furious. He was talking about what happened with Breda and his landlady and she asked him can I go home.

Now, maybe you don't like the fact that she was there. Maybe you don't like the fact that she asked to go home but how did she feel about it [784] then?

She didn't remember how she got there. She didn't know where her friend was or where her friend had gone. She didn't know how she ended up with no clothes on and she's in

a room with this furious man who is angry about what happened with her friend a few hours before. Is it any wonder that she wanted to leave and he told her he's going to call a cab, but she doesn't think that he really did and then he demands sex. He becomes more violent and more furious when she says no.

What were his words to her? "You're not leaving until you make me come." And it goes from there. He's not satisfied. He forces her to have oral sex. He pulls her hair. She tells you how she pulled away. She told you how he slapped her. She told you how he took out the gun.

She tells you how she tried to run into the bathroom. She tells you how she looked out that window and talked to herself how can I get out of here, but she couldn't because the window was too high.

She told you how she ran into Freddy's room. [785] "Freddy, help me," and Freddy wouldn't help.

She tells you that when he got her back into his room, he was even more angry. "Look what you did now. You involved Freddy in this. You no good ten-cent whore." That was she told you.

Then you heard that he beat her. He beat her up pretty badly.

Now you hear Mr. Johnson tell you that these injuries, these injuries aren't consistent with one punch. They are consistent with what the defendant tells you. Well, you use your common sense, ladies and gentlemen. You decide if three punches could cause these injuries.

Imagine how he beat her. Imagine how she must have felt in that room being beaten by him. Imagine how she was terrified, how she wondered how could she ever get out of there, would she ever get out of there. Imagine how she felt when she saw him take out the gun and load it, fiddling with the bullets as she said.

Remember how she told him how she asked to call Ireland so she could say good bye to her family. Imagine how her eye must have felt at that time, all swollen.

[786] She told you it was almost shut. She couldn't see. It must have been throbbing. He still wasn't satisfied. He had to put his penis in her vagina at that time, and then anal sex. Squeezing, slapping her buttocks, and anal sex again, and after that second anal sex putting his penis into her mouth and she described it for you. She told you it was disgusting, that it tasted like shit. After that he still wasn't satisfied, put his penis back into her vagina until she decided what can I do here? I am going to pretend to have an epileptic fit. I'm going to shake. I'm going to let spit come out of my mouth. I'm going to pretend that something is wrong with me so he'll stop, but he doesn't stop because when she's better, when she pretends she's better so she can get her clothes on and get out, he rapes her the last time.

Now, ladies and gentlemen, Mr. Johnson has told you that the complainant Nessa Winder is lying, and I ask you, do you think she made up all these details, all these feelings, how she was feeling during this attack? Looking out a window wanting to jump out?

The description she gave of him putting his [787] penis into her mouth afterwards, that it was disgusting, that it tasted

like shit, can you make up those kinds of details? Do you think you make up the kind of detail of saying that you had an epileptic fit in the middle of it to get out of this? Do you think that she could fabricate this? Do you think she could make herself cry on the stand? Do you think she could control her demeanor the way she did in this courtroom?

Did it have the flavor of proof to you? Did you believe her when you heard her? That is what I want you to think about in this case. Did she look like she was having a good time up there? Did she look like she was having a blast? That this was party time for her to get up there on the stand and describe all the details of what that man did to her? Is that a good time? Exposing yourself like that? For what? To come all the way back from Ireland for what?

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: Now, ladies and gentlemen, Mr. Johnson tells you again that it's all lies, and he comes up with the story that he says fits [788]the whole scenario here, that there wasa boyfriend involved. Well, first of all – the boyfriend scenario – I ask you this. If as the defendant says the complaining witness Nessa Winder was awake the whole time in between The Cave and getting home, why did she want to go to his house if she knew her boyfriend was coming? That's my first question to you.

The second question is, you have the testimony read back. She told you that her boyfriend was not here at that time; that she told the detective that to get out of his house. So, if

there was no boyfriend here, there was no reason to make up a rape story.

Another thing, ladies and gentlemen, the boyfriend wasn't going to walk in on them. He didn't know where she was if the boyfriend was here.

So, what was she afraid of at that time? If as Mr. Johnson says she wasn't injured, there was no problem. She woke up. She could be on her way and go home and tell him, well, I had to go out shopping this morning or I stayed over a friend's house.

[789] Would she come up with this kind of story to explain being out the whole night? Does that make sense to you?

Now, if as he said there was some kind of incident and there was a beating that took place, if she wanted to go to the police, wasn't the beating enough? Why did you come up with this long involved story? For what purpose?

You hear now that she was living back in Ireland. Obviously her boyfriend is not in the picture, so you think she comes back here almost a year later for a boyfriend who doesn't exist?

MR. JOHNSON: Objection, your Honor.

The COURT: Overruled.

Excuse me. It's the jury's recollection of what the testimony was in the case and that is what controls regardless of what either attorney says on summation.

Go on.

MS. MULLANEY: Does that make any sense, ladies and gentlemen? To make up a story for a boyfriend who may or may not even exist?

I ask you to think about her physical condition when Mr. Johnson says she's making up this [790] convoluted story because if you are going to accuse a man of rape, are you going to make it as detailed as this so that there is so much to remember or are you going to say that it was a one time thing, that he put the gun to my head, put his penis in my vagina and that was it? He beat me up and I left.

Are you going to go through so much? Eight different incidents? For what purpose? Make it more confusing for yourself?

I ask you, ladies and gentlemen, you have the testimony read back. You listen to the cross-examination of Mr. Johnson. Did any of you hear any inconsistency during cross-examination of Nessa Winder about what happened between the time that she woke up and the time that she left? Not one.

You heard some inconsistencies about whether or not she remembered what happened between the time of The Cave and the time she woke up. That is not what this case is about. Keep your eye on the ball. There were no inconsistencies with Mr. Johnson's cross-examination about what happened when she woke up.

Ladies and gentlemen, think of the fact that [791] she went right to the police. She went right to the doctors. She had told them immediately what happened. Is this the kind of thing

you can think up when you are feeling like this? I mean she must have been in pain. She told you she was. She told you how her eye felt.

Do you think she could sit down and plan out and say first I am going to say that he put his penis in my mouth and then I am going to say that he kiss me and then I am going to say -- does that make sense, ladies and gentlemen?

I asked each of you during the voir dire if you could convict the defendant if you believe the complaining witness is credible beyond a reasonable doubt, and each of you assured me that you could. Some of you said that you needed more, and I submit to you that you have gotten an awful lot more in this case than just the testimony of Nessa Winder. I ask you to consider the corroboration in this case.

Is it a coincidence that she was raped and she goes right to the hospital and right to the police saying I was beaten and I was raped? Is that a coincidence? Is it a coincidence that she [792] says I was beaten and the medical records show bruises over the upper and lower extremities of her body? Detective Giardina sees the bruises on her body.

You didn't hear anything about it from the defendant about she got the bruises on the upper and lower parts of her body. You wouldn't get bruises on the upper and lower parts of the body if you just hit someone in the eye as he described.

Is it just a coincidence that she describes to you the injuries to her eye and the medical records show the injuries? The photographs show the injuries. The medical records indicate that she should return if her vision is still blurry, meaning that her vision was blurred.

Dr. Karimi described the trauma to the eye, and that both Dr. Karimi and the defendant's expert, Dr. Gilbert, say that the eye injury was recent. It was a recent trauma.

Is it just a coincidence that she tells you that the injury lasted and that on May 25th she says the photographs were taken you can still see the blood clot in her eye? Is that a coincidence?

Is it just a coincidence that she tells [793] Deective Giardina that he had a gun and that they go to his house and they execute the search warrant and isn't that a surprise? Another lie by the complaining witness? Was it a lie that he had a gun or is it corroboration again of what she told you?

Is it a coincidence, ladies and gentlemen, that Nessa Winder can take the stand and tell you how he loaded that gun and the defendant himself doesn't remember ever showing her the week before how to load the gun? Well, if he never showed her, how does she know how to load it? There are lots of guns in this world, ladies and gentlemen, and you don't put magazines in all of them. Some of them you put a bullet right into the gun itself.

How does she know how to load that gun unless she saw him do it, unless she saw him do it right before he held it to her head and threatened her?

Ladies and gentlemen, as you listen to the law as the Judge instructs you, I ask you to listen to the instruction on whether the gun was loaded at the time that the police officers found it, and I submit to you that if you listen to the law and recall how Detective Giardina told you that the [794] magazine was in the holster and the holster was right next to the gun in

close proximity, the People have proven to you that this gun was loaded.

I ask you to listen to the law and follow the law as to that. The People are not required to prove under the law that there were bullets in that gun to prove that it was loaded.

This Vitullo Kit, ladies and gentlemen, I submit to you that this also, the evidence ontained in this kit also corroborates what Nessa Winder told you, and I ask you, I implore you to please remember what she told you he told her from the beginning that this incident started. "Nessa, you're not leaving here until you make me come."

She never told you he ejaculated in her mouth. She never told you that he ejaculated in her anus, but what is very interesting, ladies and gentlemen, is the last act is penis into her vagina and where is the sperm in this rape kit? On her vaginal slide. He never ejaculated before then.

Now, there has been a lot of talk about these medical records and there has been a lot of talk about what should have been here as far as trauma is concerned.

[795] First of all, as you listen to the Judge's law I can assure you that it is not an element of rape or sodomy that there is trauma to a woman's vagina or anus. You are not going to hear that. It is not an element.

I don't have to prove there was injury to prove there was a rape or sodomy. That is the first thing.

The second thing is Nessa Winder is not a child. She is not a small child. She is not a woman who is a virgin. She was

very clear about that with you. She is a woman who is sexually active.

Ladies and gentlemen, we are alleging that the defendant raped and sodomized Nessa Winder by means of forcible compulsion. Forcible compulsion does not mean that he forced his penis into her vagina. The forcible compulsion in this case is him beating her up and holding the gun to her head and the back of her neck and telling her he would kill her.

What did she tell you after that? Well, let me ask you this, ladies and gentlemen. If you had been beaten like this, if you knew the violence [796] that that man could to you, would you struggle or would you just lay there and pray that it's going to be over.

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: She told you she didn't struggle when he was inside of her. She told you she felt pain when he was in her anus. Dr. Gilbert and Dr. Karimi told you that if there is no struggle, there is not always going to be trauma, and I ask you to rely on the testimony of Dr. Karimi and Dr. Gilbert.

She didn't say she struggled with him while he was inside. She told you she didn't struggle because she was afraid.

Now, Mr. Johnson may want to see internal injuries but Nessa Winder didn't want internal injuries on top of this, ladies and gentlemen. She had suffered enough.

Is it just a coincidence, ladies and gentlemen, that on the day after this incident, the defendant calls and leaves a message on the tape? The English language is kind of a funny thing, isn't it? We can be pretty specific. The message isn't, "Nessa, [797] look, I have really thought about it and I am really sorry that I hit you," and a message. It's a little more detailed than that, more interesting than that. He's considered the entire situation. It was his fault. He was a golden asshole. He's sorry and he'll never bother her again. They should live safey and peacefully.

Does that sound like an apology to a slap in the face? Mr. Johnson wants you to ignore all of this evidence that I have just gone over with you, ladies and gentlemen. He wants you to put it all aside and he wants you to find that reasonable doubt based on that defendant sitting right there.

Just because Mr. Johnson asks you to do that doesn't mean you have to. I ask you to listen to the Judge's charge on interested witnesses in this case. I ask you to consider whether the defendant is an interested witness. I ask you, who has the most to gain or lose who sits in this courtroom?

He came in here and he told you that he didn't do any of these crimes. He did two; he assaulted her and he had the gun in his house.

MR. JOHNSON: Objection, your Honor.

The COURT: Overruled.

[798] MS. MULLANEY: You heard on voir dire this is not TV and it's not Perry Mason. What did you expect him to say? Did you expect him to come in here and admit it? You don't get any extra credit for denying it, ladies and gentlemen.

I ask you to consider his demeanor on that stand. I ask you to consider that smooth slick character you saw here, the one who had an answer for everything. Cold, calculating rapist, that's what you saw, ladies and gentlemen.

You heard Mr. Johnson ask you on voir dire is a lie a lie? Is a white lie the same as a big lie and you all answered yes. Yes. If you lie once, you know, that's always a lie.

Well, who is the one witness who came into this courtroom and admitted that he has lied in the past? Not Nessa Winder. Not Breda Keegan. Only one man, the defendant in this case, Ray Agard.

I ask you to consider his character in evaluating his testimony. Consider what he admitted to you from that witness stand.

Is he a man that has respect for the law? A convicted felon? A man who admittedly has an [799]unlicensed gun hanging in his closet? Is that someone who has respect for the law or is that someone who has no problem breaking the law? Is that a man who sees himself as above the law, who can do what he wants despite the law?

I ask you to consider his truthfulness, his honesty. A man who tells you that I have lied on resumes, who says everybody beefs it up. A man who has denied that he has been convicted of a felony to get what he wants, a job, three times.

What kind of credibility does this man have? He will lie to get a job, ladies and gentlemen. What will he do in this courtroom?

A man who told Detective Giardina that he had no gun in his house. Then after that it was a toy gun. After that a real gun with no bullets. Yet the defendant takes the stand here and tells you that he never told Detective Giardina that.

Who is lying, Detective Giardina or the defendant? You decide, ladies and gentlemen.

MR. JOHNSON: Objection, your Honor.

THE COURT: All right. Overruled. Keeping in mind, of course, that it's the People's burden of proof to prove the case beyond a reasonable doubt. [800] However, you may consider all the testimony in the case as I will charge you.

MS. MULLANEY: Remember, ladies and gentlemen, that he denied that felony conviction to get a job.

Don't let his denials fool you. What kind of man is he? Five-foot-seven inches tall, 190 pounds according to his pedigree information taken from Detective Giardina. By his own admission, a highly trained martial artist.

Now, ladies and gentlemen, I asked a lot of questions about that martial artist. Some of you are probably pretty tired of me harping on that question of martial arts. What kind of man beats a woman like this? What kind of man abuses a woman the way you heard Breda and Nessa describe it? I ask you to think about what he told you and I ask you if it makes any sense.

Use your common sense here. A lot of what he told you corroborates what the complaining witnesses told you. The only thin that doesn't is the denials of the crimes. Everything else fits

perfectly. He just wants you to believe his version of what happened.

Does it make sense? He told you Breda wanted to [801] go home. Breda was reluctant to go to his house. Breda was loud. Breda was very agitated. Breda tried to get Nessa to go home.

Does this sound like a woman that nothing has happened to? Does this sound like a woman who is nervous, who is upset, who has just had a gun held to her head?

Why was she so agitated? Why was she so upset at the time? Why was there so much noise that the landlady was outside at six o'clock in the morning?

The defendant tells you everything was fine. Breda left and Nessa woke up at nine o'clock in the morning and they had sex, and he tells you everything was fine. He says they woke up again at one o'clock. Then he says they got into an argument.

Did what he said to you, ladies and gentlemen, make sense to you? Did it make any sense at all?

On his direct examination he tells you how when he turned her around he got a scratch on his lip I ask you to take a look at this photo and see if you see marks of any injury of any sort on his face.

[802] He tells you that when he turns her around -- imagine this -- she immediately is able to fit her finger into his mouth from being turned around, and scratching him inside. Does that make sense?

This is a highly trained martial artist. This is someone who by his own admission tells you that he has fought hundreds of times. This is a man who can't deflect her hand? Can't push her hand away from his mouth? This is a man who can't push her away? This is a man who can't hold her arms down?

At 190 pounds, ladies and gentlemen, and her being 108 pounds, he is almost one hundred pounds heavier than her, and yet this little woman was able to get her finger into his mouth and scratch him. Does it make any sense?

Then what about on cross-examination, all of a sudden on cross-examination it was "I forgot. I forgot. She had slapped me three times before she got her finger into my mouth."

Well, wait a second. I thought you turned her around and she had her finger in your mouth. Where did the three slaps come in here? And again, ladies and gentlemen, –

[803] MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled. It's the jury's recollection of what the testimony was that counts.

MS. MULLANEY: Three slaps? One slap, maybe. Two more slaps and he let her hand keep coming? Think about what the words were that he told you when she scratched him. In a direct response to pain, my hand shot out and I hit her.

Does this sound rehearsed? He said it twice. He said it on direct examination and he said it on cross. I ask you to think about the way that he testified.

He told you that when this woman left his house, her eye was a little red but she looked fine to me. Does that make sense? Could she have looked fine at that point? He tells you, ladies and gentlemen, that his landlady called up because of the screaming.

Now, what he described to you, ladies and gentlemen, wasn't screaming. It was a small physical altercation. Where did the screaming start? What happened? There is more to it than what he's telling you.

Use your common sense. You know, ladies and [804] gentlemen, unlike all the other witnesses int his case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: He's a smart man. I never said he was stupid. He's not accused of being stupid and he wasn't stupid. He used everything to his advantage. He even tried to pick the right victims here. He tried to pick victims that you

wouldn't like, that he thought you wouldn't believe because of what happened and the circumstances here.

He's not stupid. He's not stupid at all. I ask you to consider how his face looked three days later. Not a mark on him.

I ask you to consider that by his own words he [805] needed the medical treatment and he told you on that stand that he was angry when Nessa left. He was angry at the way she had treated him. He didn't like what she had done. He didn't like that his landlady had called. He didn't like the altercation. He wasn't happy at all.

Yet this is the man who calls her the next day to tell her that he was sorry for what had happened? Does that make sense?

Ladies and gentlemen, you heard a lot of testimony from Breda and Nessa. You heard what the defendant did to them. You heard the situation that they got themselves into in this case. They believe that nothing bad could happen to them. They believed that the defendant wouldn't hurt them. They trusted him and they were wrong.

That is not a defense in this case. That doesn't mean that he is not guilty. Nessa Winder paid a horrible price for her mistake, didn't she?

Do you think that woman would ever forget what happened to her? Do you think she will ever be able to put out of her mind what she went through on that day? How it felt to have a gun against her head?

[806] The defendant took a lot of advantage of the position that the two complainants put themselves in. This was a crime of opportunity. She was there. He wanted sex. She didn't want it and he raped her.

He was the one in power. He was the one in control, and he was going to have what he wanted no matter what, no matter what it took.

He forced her. That man did almost as much damage to Nessa Winder in the space of four hours that he could possibly do. What more could he have done to her? He didn't treat his dog the way he treated Nessa Winder.

MR. JOHNSON: Objection.

THE COURT: Sustained.

MS. MULLANEY: He beat her. He sexually abused her. He threatened her life. He tried to break her spirit and he tried to break her will, but Nessa and Breda were the wrong victims to pick in this case because they had some strength. No matter what their lifestyle, no matter what their behavior, they were able to come in here and tell you what happened to them.

You heard the Judge tell you in the beginning [807] that you cannot decide this case on bias or prejudice, or whether you like someone or don't like someone. You have to decide this case on the evidence.

I ask all of you to give Nessa and Breda's testimony all of the credit that it is worth. Everything that it is worth. I ask you to give the defendant's denials exactly what they are worth. Exactly what they were worth when he denied his felony

conviction on his job applications. What did his denial mean then? Nothing much.

I ask you to listen to the law, to follow the law and to judge this case on the facts and the evidence, and more than anything else, to give the complainants justice and to find the defendant guilty of each and every count.

MR. JOHNSON: Objection your Honor.

THE COURT: Thank you, Ms. Mullaney.

We are going to have a brief recess before the Court's instructions on the law. The case is not over. Do not discuss it. I will see you back here very shortly.

(Whereupon, the jury withdrew from the courtroom)

[808] MR. JOHNSON: Your Honor, if I may, at this time I am going to move for a mistrial based on error and comments of the prosecution in summation.

First with the cumulative effect of prejudicial appeals to the jury's emotions and prejudice, as well as in particular twice making comments about the complaining witnesses returning from Ireland to testify at the trial. That is something that never came out in the evidence at the trial. It is an improper attempt – it's an improper attempt to bolster the complaining witnesses' credibility.

That was something I listened for at trial. It never came out. I never had the opportunity to cross-examine either of the complaining witnesses concerning accommodations made for them in their return from Ireland or in their stay here. Whether

the District Attorney made any accommodations or whether they gained any benefit such as hotel and air fare and whatever other accommodation may or may not have been made.

It is an area that I did not go into because there was never any evidence at trial that they returned from Ireland. It never came out at trial that they returned from Ireland to testify.

[809] The District Attorney twice made reference to that. It was not only not in the case but because it wasn't in the case it was a line of cross-examination that was not gone into regarding that.

The District Attorney also made reference to prayer. making an improper appeal to the jurors' emotional or religious beliefs.

MS. MULLANEY: Judge, I never said anything about prayer. I don't know what Mr. Johnson is referring to.

MR. JOHNSON: Playing it would be over, or something to that effect.

The District Attorney made a comment that Mr. Johnson wanted to see internal injuries in this case, which is a prejudicial misstatement of my position. My position was that if it had happened, there would be. To tell the jury that Mr. Johnson wanted to see internal injuries in the case is truly prejudicial and appeals to their emotions and a key shot at the defense.

She also said that Mr. Agard admitted that he assaulted the complaining witness. Assault is a legal term. Mr. Agard described what happened. He never admitted any assault.

[810] Once again, cumulative prejudicial error.

She said that he admitted having an unlicensed gun hanging in his closet. There was never any testimony at this trial regarding whether or not this gun was licensed. That is something that never came out at the trial. It's a fact that the District Attorney is now trying to prove in her summation along with the complaining witnesses returning from Ireland that never came out in the facts of this case.

Once again, attempting to prejudice the jury against Mr. Agard.

She commented on Mr. Agard's presence at the trial. He has the absolute constitutional right to be here, your Honor. It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial.

I believe your Honor sustained the objection to the dog comment but it was an unnecessary prejudicial comment nonetheless.

For these specific and the cumulative effect, I would move for a mistrial.

THE COURT: The motion is denied. It hardly [811] reaches the standard that one would even begin to consider that, the dog.

The fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as a matter of fact.

The reference to prayer was properly addressed by the District Attorney. It was hardly an appeal to religious feelings at all.

The comment regarding internal injuries in the manner in which it was stated I think was properly stated and the jury understood what the District Attorney was saying. Not what you personally wanted but in order for the People to prove their case, they had to show there were internal injuries. I think any fair and reasonable hearing of that would reach that conclusion.

So I think you are off base on that.

The defendant is charged with possession, knowingly and unlawfully possessed a gun. Under the circumstances your comments about the unlicensed gun are inept. Your motion is denied.

We will have a brief recess before we resume.

[812] MR. JOHNSON: I assume your Honor also is denying any error in the prosecution's twice commenting on the complainant's return from Ireland.

THE COURT: The Court will charge the jury with respect to – I have already indicated that on several occasions, at least once that I recall offhand and I will do so again during my charge – that the jury will consider only what they hear and not speculate and what their recollection of the testimony was.

As a matter of fact, both counsel took the opportunity to assume the robes in this case and improperly told the jury that they can ask for the testimony to be assured of what was said. That is a function of the Court, but I am glad under the

circumstances since you both said it and the Court will say it again, the jury will very clearly understand that their recollection of the facts in this case is what controls and not what the attorneys say on their summations.

Under the circumstances the comment to which you immediately refer is of no consequence under the circumstances. I am not satisfied that requires [813] individually or cumulatively under the circumstances a granting of your motion for a mistrial.

MR. JOHNSON: I would note my exception.

THE COURT: Thank you. We will resume in a few minutes.

(Whereupon, a brief recess was had).

VERDICT SHEET

PEOPLE OF THE STATE OF NEW YORK

V. RAY AGARD

COUNT	CHARGE	GUILTY	NOT GUILTY
1	RAPE IN THE FIRST DEGREE		X
2	RAPE IN THE FIRST DEGREE		X
3	RAPE IN THE FIRST DEGREE		X
4	SODOMY IN THE FIRST DEGREE		X
5	SODOMY IN THE FIRST DEGREE		X
6	SODOMY IN THE FIRST DEGREE		X
7	SODOMY IN THE FIRST DEGREE	X	
8	SODOMY IN THE FIRST DEGREE		X
9	SEXUAL ABUSE IN THE FIRST DEGREE		X

COUNT	CHARGE	GUILTY	NOT GUILTY
10	ASSAULT IN THE SECOND DEGREE	X	
11	UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE If you find the defendant guilty of Count 11 do not consider Count 12 and go on to consider Count 13. Only if you find defendant not guilty of Count 11 may you consider Count 12.		X
12	UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE		X
13	INTIMIDATING A VICTIM OR WITNESS IN THE THIRD DEGREE		X
14	MENACING		X

COUNT	CHARGE	GUILTY	NOT GUILTY
15	CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE		X
16	CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE		X
17	If you have found defendant guilty of either Count 15 or Count 16, do not consider Count 17 or Count 18, and go on to consider Count 19. CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE If you find defendant guilty of Count 17, do not consider Count 18 and go on to consider Count 19. Only if you find defendant not guilty of Count 17 may you consider Count 18.	X	

COUNT	CHARGE	GUILTY	NOT GUILTY
18	CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH		
19	CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE	X	

(4)

No. 98-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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June 7, 1999

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QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in extending this Court's narrowly construed decision in *Griffin v. California* -- which prohibited comment or instruction implying that the defendant's exercise of his right to remain silent constitutes proof of guilt -- to a prosecutor's comment that a testifying defendant's opportunity to hear and use the testimony of other witnesses negatively affected his credibility?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 117 F.3d 696 (Oakes, J; Winters, J., concurring; Van Graafeiland, J., dissenting). The order of the Court of Appeals for the Second Circuit denying rehearing or rehearing in banc is reported at 159 F.3d 98 (Oakes, J.; Van Graafeiland, J., dissenting).

The memorandum decision of the United States District Court for the Southern District of New York (Raggi, J.) was delivered orally by the court and transcribed in minutes dated March 15, 1996. The unreported opinion, as transcribed, is reprinted in the appendix to the Petition for a Writ of Certiorari at pp. 1a-9a, and the order and judgment of the court are reprinted at pp. 10a-11a.

The decision of the New York State Court of Appeals denying the defendant's application for leave to appeal to that court from the decision of the Appellate Division, Second Department is reported at 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994). The decision of the Appellate Division, Second Department, modifying the judgment of conviction and, as modified, unanimously affirming the judgment is reported at 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993).

JURISDICTION

On July 3, 1997, the Second Circuit reversed a decision of the Eastern District denying a petition for a writ of *habeas corpus* and remanding the case to the district court, with directions to grant the petition. On October 23, 1998, the Court of Appeals for the Second Circuit denied a petition for rehearing and petition for rehearing in banc. The petition for certiorari

was timely filed on January 20, 1999, and this Court granted the petition on March 22, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V - Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI - Jury Trial for Crimes and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Trial

On the evening of April 27, 1990, Nessa Winder and her friend, Breda Keegan, twenty-three-year old women from Ireland, went to a nightclub in Manhattan. There, they first met the thirty-five-year old defendant, whom they identified in court (Record: 38,[1] 235).[2] The evening culminated in a consensual sexual encounter between Ms. Winder and the defendant that involved oral sodomy and vaginal intercourse. During that encounter, Ms. Winder rejected the defendant's demands for anal intercourse; also, the defendant showed her a gun and holster he kept in his apartment (Record: 38, 40-43, 48-50, 168-171, 235, 266).

The following week, at the defendant's urging, the two women met the defendant at a nightclub, where he was with his friend, Albert Kiah (Record: 65-69, 180-181, 241-244, 268). The four, accompanied by defendant's roommate, ultimately found themselves back at the defendant's apartment, where an intoxicated Winder fell asleep on the defendant's bed. When Keegan tried to leave with Winder, the defendant became verbally abusive, and threatened her with a gun into leaving the apartment with Kiah but without Winder (Record: 244-247, 249-252, 272-274).

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1. Numbers preceded by "Record" refer to pages of the trial transcript. Those preceded by "JA" refer to the Joint Appendix filed with this Court.

2. The presence of the defendant was also duly noted by the court clerk, who repeatedly announced, in the presence of the jury, the presence of all the parties (Record: 157, 292). The prosecutor also pointed and referred to the defendant during her opening statement (Record: 7, 20).

When Winder woke the next morning, she found herself wearing nothing but a vest and lying next to the defendant, who was wearing only his underwear. She could remember nothing after leaving the nightclub the night before (Record: 65-66, 68, 73, 75, 182-187, 220).

When the defendant awoke and she refused his demands for sex (Record: 75, 77), a violent encounter ensued. Over a period of time, the defendant battered her around the face and body, threatened to kill his physically smaller victim with his gun, and then repeatedly anally and orally sodomized her, and raped her (Record: 75-81, 86-99, 106, 223-224). The terrorized Winder did not move during the anal sodomy so that the act would be less painful (Record: 94-95, 223-224).

After threatening to kill her if she contacted the police, the defendant let Winder leave (Record: 99). She immediately contacted Keegan, who picked up the hysterical and visibly beaten Winder and drove her directly to the police precinct, and thereafter to the hospital where Winder was treated (Record: 101-102, 254-258).

The existence of Ms. Winder's facial and body injuries was substantiated by the testimony of Detective Philip Giardina (Record: 325-326), as well as by medical records and expert testimony (Record: 413, 421-423, 427). Photographs of Ms. Winder taken the day after the attack, as well as three weeks later, were introduced into evidence and demonstrated the extent of her injuries; her eye showed hemorrhages for four to five weeks afterwards (Record: 87-88, 106-107). Additionally, while no seminal fluid was found in the oral and anal samples taken from Ms. Winder, testing revealed the presence of spermatozoa in the samples of vaginal fluid (Record: 441-444,

452-457, 474-477). While there was no evidence of trauma in Ms. Winder's vagina or anus, it was established through expert testimony that the absence of trauma did not mean that a rape had not occurred, or connote the absence of force or pain during the act (Record: 411-417, 420, 422-425, 427, 428, 431-433). These conclusions were confirmed by an expert called by the defense, who also testified that the injuries to Ms. Winder's eye were fresh (Record: 602-604, 620-621, 634-635, 640, 648).

The following day, defendant left a telephone message for Winder on her answering machine and apologized for being a "golden asshole" and for the "entire situation." He wished that Winder would "live safefully [sic] and peacefully" (Record: 108-109, 158-160, 256-259, 264-265).

As a result of a search warrant executed at defendant's home, Detective Giardina recovered an operable .45 caliber automatic handgun, a holster, and two magazines containing shells. Ms. Winder identified the gun as appearing to be the gun used by the defendant (Record: 160). Defendant was arrested, and initially denied that he had a gun. He then stated that he had a toy gun, and then finally stated that he had a gun but that he was holding it for a friend (Record: 296, 306, 329-332, 341-342). The defendant also acknowledged that he had been involved in a fight with Winder and that, during that fight, she scratched him and he "mushed" her face. He admitted that they had had sex, but claimed it was consensual (Record: 329-332, 341-342).

The defendant, who sat through the testimony of all of the prosecution witnesses, testified on his own behalf, and essentially claimed that all sexual acts between he and Ms. Winder were consensual (Record: 650-652, 658, 668-672, 676-677, 705, 709-712, 719-726). He admitted calling Winder the

next day to apologize, but claimed that he was only apologizing for "mush[ing]" her face. According to the defendant, who claimed to be a trained martial artist, the complainant became "hyper" and violent that morning over concern about her boyfriend who was scheduled to visit from Ireland, and scratched him on the lip; he struck her during an attempt to calm her down. He admitted that he did not seek medical treatment for his scratch and attributed the absence of any scar to the fact that he was cut inside of his mouth (Record: 669-672, 694, 711-718, 721, 725-726). He also admitted possessing a weapon, but claimed that it was Ms. Winder who, during their first encounter, removed it from his closet and strapped it on when he momentarily left his bedroom to go to the bathroom (Record: 653, 676). He also denied threatening Keegan, a claim echoed by defense witness Albert Kiah (Record: 512-522, 524, 531-535). During cross-examination, the prosecutor attempted to establish that Kiah had tailored his testimony based upon pre-trial contact with the defendant (Record: 536-544).

In part, the prosecutor cross-examined the defendant concerning his prior felony conviction and various prior bad acts, all of which had been the subject of a pre-trial hearing (Record: 677-687, 691-694), and the fact that he was a trained martial artist who could easily have fended off Ms. Winder (Record: 694, 712-717, 721-722). Notably, during cross-examination the defendant recanted the statements he had made to Detective Giardina concerning his gun, and claimed that he never denied having a gun or stating that the gun was a toy. He also denied providing certain pedigree information to the detective (Record: 707, 709-710). Defendant revealed for the first time on cross-examination that Ms. Winder had slapped him during their first encounter the week before the crime; he testified that he simply forgot to mention that fact previously (Record: 719-720, 726).

Defendant's Accusations of Tailoring

In his opening statement, even over a sustained objection, defense counsel repeatedly told the jury that the evidence would demonstrate that Ms. Winder and Ms. Keegan were lying, and that they had blended the truth in with falsehoods in order to make their lies more effective (Record: 29-33). During the trial, he cross-examined both the complainant and Ms. Keegan about whether they had spoken about the case to one another (Record: 202-203, 276-277, 279-282), and moved to strike Ms. Winder's testimony and preclude Ms. Keegan's based upon apparent contact between them during a break in Ms. Winder's testimony (Record: 204-212 229-230). He opposed reopening an evidentiary hearing on the ground that the prosecutor was "now in a position to tailor whatever subsequent testimony comes to meet the requirements that your Honor has determined. . ." (Record: 130-131). He even requested that a serologist/witness be excused from the courtroom during legal argument concerning the defendant's weapon (Record: 470).

In his summation, he repeatedly referred to the complainant and Ms. Keegan as liars (JA: 6, 8, 10, 18, 19), characterized their testimony as "lies" (JA 9, 24, 28) and as a "script" and as "scripted" (JA: 17), and explicitly argued that Ms. Winder and Ms. Keegan had "talk[ed] it over" before deciding to go to the police and crying rape (JA: 15). He commented that Ms. Winder did not want to "own up" to the fact that she wanted to spend the night with the defendant "because it did not fit her story" (JA: 16). He also asked the jury to compare the victim's testimony with defendant's, and to "consider the reasonableness of the two different stories." Finally, he argued that defendant's description of the events on the day of the crime, was a "more reasonable and natural

extension of the relationship that started the weekend before," and was "consistent" (JA: 12, 14, 18, 21).

The Prosecutor's Response

The prosecutor devoted much of her lengthy summation to the nature and strength of the proof of guilt (JA: 29, 30, 34-36), the facts supportive of the credibility of Ms. Winder and Ms. Keegan (JA: 32-33, 36-37, 39-44), and the defendant's motive (JA: 33-34). She also made a multi-pronged attack on the defendant's credibility relying in part on his interest in the outcome of the case, his felony conviction, his prior bad acts, and his recantation of statements made to Detective Giardina (JA: 31, 44-46, 47-48).

The prosecutor also pointed out that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denial of the crimes, and that "[e]verything else fits perfectly" (JA: 46-47). In part she made this argument based upon the defendant's demeanor on the witness stand, asking the jurors to consider the "smooth slick character you saw here, the one who had an answer for everything" (JA: 45), and then asking them if the manner in which the defendant testified concerning how he fought off Ms. Winder "sound[ed] rehearsed" (JA: 48). In support of this tailoring argument, she referred to how defendant's explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it "fits the whole scenario here" (JA: 36-39); and, to how "all of a sudden" on cross-examination the defendant recalled that Ms. Winder had slapped him during their first encounter (JA: 48).

Towards the end of her summation, she then remarked:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? . . . He's a smart man. I never said he was stupid. He's not accused of being stupid and he wasn't stupid (JA: 49).

The trial court rejected the defense protest that these last comments constituted wrongful comment on defendant's constitutional right to be present at trial (JA: 54), stating that the "fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as [sic] a matter of fact" (JA: 54).

The Verdict and Sentence

After deliberating for over three days, the jury returned a verdict convicting defendant of one count of Sodomy in the First Degree (New York Penal Law Section 130.50[1])(anal sodomy), two counts of Criminal Possession of a Weapon in the Third Degree (New York Penal Law Sections 265.02[1], [4]), and one count of Assault in the Second Degree (New York

Penal Law § 120.05) (Record: 1061-1064). It acquitted the defendant of the rape and oral sodomy charges.[3]

The defendant was sentenced as a second felony offender to concurrent indeterminate terms of imprisonment of ten to twenty years on the sodomy count, and three and one-half to seven years on each of the weapon counts.

State Court Proceedings on Appeal

On December 20, 1993, the Appellate Division modified the judgment of conviction by reversing and dismissing one conviction of third-degree weapon possession, and, as modified, unanimously affirmed the judgment. *People v. Agard*, 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993). In so ruling, the Appellate Division characterized the proof of guilt as "overwhelming," and, in conclusory form, found the contention that the defendant's right to a fair trial had been abridged due to the prosecutor's summation comment regarding defendant's advantage in hearing other witnesses and tailoring his testimony to be without merit.

On April 14, 1994, defendant's application for leave to appeal to the New York Court of Appeals -- in which he raised the same claim -- was denied. *People v. Agard*, 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994).

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3. Defendant was originally charged in a 36-count indictment with various sex crimes and weapons charges. Eleven were dismissed by the prosecutor and six were dismissed by the trial court before the case was submitted to the jury. The defendant was convicted of three of the remaining nineteen counts. The trial court subsequently dismissed the assault charge on the ground that the jury had acquitted defendant of the underlying assault, which was rape (Record: 1066, 1073).

Federal Court Proceedings

In his June, 1995 petition for a writ of *habeas corpus*, the defendant argued in part that the prosecutor improperly infringed upon his right to be present at trial and to confront his accusers by noting in summation that he had had the opportunity to hear all of the testimony before he testified in his own behalf.

By a decision dated March 15, 1996, the District Court denied the petition (Raggi, U.S.D.J.). The court recognized that it could not "hope on a cold record" to resolve the credibility issue that was before the jury, and that such resolution was not its "task in any event." Then, after noting that the mixed verdict reflected careful deliberation by the jury, the District Court rejected defendant's claim that the prosecutor's summation infringed on defendant's right to be present and confront his accusers under the Sixth and Fourteenth Amendments. While the remarks came "dangerously close to commenting on the exercise of a right," the court concluded that based upon the context in which they were made and the summations of both counsel, it had no doubt that the defendant had failed to demonstrate that he was actually prejudiced by the comments or that the jury was swayed by them.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ unless the state afforded defendant a new trial within sixty days from the date of the mandate. A majority of the panel concluded, over a vigorous dissent, that the prosecutor's summation remark, that insinuated to the jury for the first time on summation that a defendant's presence in the courtroom gave him a unique opportunity to tailor his testimony to match the evidence, violated a criminal defendant's constitutional rights to confrontation, his right to

testify on his own behalf, and his right to receive due process and a fair trial. *See Agard v. Portuondo*, 117 F.3d 696, 709 (2d Cir. 1997).

In so ruling, the Second Circuit relied on this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), in which this Court held that it is unconstitutional for a prosecutor to suggest to jurors that guilt can be implied from a defendant's decision to exercise his Fifth Amendment right not to testify because such a practice effectively penalizes the defendant for exercising his Fifth Amendment rights. The Second Circuit reasoned that a prosecutor's summation remarks noting the defendant's unique opportunity to be present throughout trial invites the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and therefore penalizes him for exercising that right. According to the court, such comments imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, thereby forcing defendants either to forgo the right to be present, forgo their right to testify last, or risk the jury's suspicion. 117 F.3d at 709.

In upholding what it characterized as a Fifth and Sixth Amendment right to the "opportunity of a defendant to fabricate or conform testimony without comment" (117 F.2d at 710 n.11), the Second Circuit found that a prosecutor wishing to impeach a defendant's credibility had other avenues available, thus rendering the need to impeach based upon the opportunity to fabricate inadequate to overcome a defendant's confrontation rights. 117 F.3d at 711. The court also found it improper to raise the "specter of fabrication" for the first time in summation because such a tactic deprives a defendant and counsel of the opportunity to rehabilitate the defendant's credibility. 117 F.3d at 708 n.6.

In finding a deprivation of the defendant's Fifth Amendment right to testify, the Second Circuit again cited *Griffin v. California*, in holding that the remarks made by the prosecutor had a fatal chilling effect upon that right. In finding a due process violation, the Second Circuit found unredeeming the brevity and isolated nature of the prosecutor's comment. It concluded that a comment that directly disparaged the defendant's exercise of constitutional rights was severe in magnitude, and, in the absence of curative instructions by the trial court and in light of the closeness of the issue of culpability, therefore worthy of reversal. 117 F.3d at 712.

Upon denying the petition for rehearing (again with a vigorous dissent), the majority narrowed the rationale of its earlier ruling, and retreated from any language in the prior decision that suggested that it was constitutional error for a prosecutor to elicit facts tending to show that a defendant tailored his testimony, or to comment on that factual showing. It stated that it was proper to make a factual argument based upon a defendant's testimony -- with its principal focus based upon a comparison of and fit between the defendant's testimony and that of other witnesses -- but that a generic argument that defendant's credibility is less than that of prosecution witnesses solely because he alone attended the entire trial was proscribed comment on the exercise of the right to be present. The court concluded that because the prosecutor in this case ran afoul of this prohibition it was adhering to its prior reversal of the district court decision.

SUMMARY OF ARGUMENT

In *Griffin v. California*, 380 U.S. 609 (1965), this Court ruled that a prosecutor's comment that a defendant's failure to testify should serve as proof of guilt violated the self-

incrimination clause of the Fifth Amendment because it unduly penalized the right to remain silent. The Second Circuit extended that holding, which this Court has stated should be narrowly construed, and ruled that a prosecutor's comments that a defendant tailored his testimony based upon his opportunity as an accused to hear the testimony of other witnesses improperly compromises his Sixth Amendment confrontation right, his Fifth Amendment right to testify, and his due process rights because it forces him to either forgo those rights or have their exercise burdened by such comment. This was error.

This Court has recognized on many occasions that the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. Rather, vital to determining the propriety of such an election is an inquiry into the degree to which the constitutional right is impaired and the necessity of the government practice to the maintenance of fairness and reliability in the adversarial process.

Unlike the condemned comments in *Griffin*, comments alerting a jury that a defendant was advantaged as a witness by virtue of his presence in the courtroom during the testimony of other witnesses, and that he perverted that advantage into tailored testimony, are designed to foster the fundamental goal of truth-seeking in the adversarial process. Although a defendant is immune from the witness sequestration rule, he is still subject to the ills created by exposure to other testimony. And once he assumes the witness stand, like other witnesses his credibility may be impeached based upon that fact, particularly when his testimony is tailored. The valued goal of the ascertainment of the truth would be undermined if a defendant

was permitted to present tailored testimony reliant on the prosecutor's disability to challenge his testimony.

Additionally, as opposed to the comments in *Griffin*, such comments do not excessively burden a constitutional right or convert the exercise of a right into proof of guilt. Unlike comments that assume guilt from the failure to testify, the comments at issue here would not lead a juror to conclude that a defendant's exercise of the right to be present at his trial or to testify on the defendant's own behalf was evidence of his guilt. And, while a defendant cannot explain his decision not to testify without giving up the right to remain silent, the defendant here could have sought to counter the inference raised by the prosecutor, but chose not to do so. Rather than forcing a defendant to forgo his confrontation right, such comments merely deprive a defendant of the right to be insulated from suspicion of concocting a defense consistent with the available facts. Also, such comments no more "chill" the exercise of the right to testify than myriad other permissible forms of impeachment; rather than forcing a defendant to forgo the right to testify, they merely force him to engage in tactical decisionmaking.

Equally erroneous was the Second Circuit's finding of a due process violation. The majority assumed a *Griffin* error, but *Griffin* involved a Fifth Amendment, rather than a due process, violation. In any event, the prosecutor's comments were proper and otherwise invited by defense counsel. Certainly, considering their brevity, the proof of guilt (described as "overwhelming" by the State appellate court), and the trial court's instructions, the comments did not infect the trial with unfairness.

Finally, no specific factual references were necessary to permit the comment on defendant's opportunity to hear and make use of the other witnesses' testimony. Like other permissible forms of impeachment, the weight to be given defendant's opportunity and use of that opportunity in assessing his credibility rests with the jury. Moreover, the prosecutor did explain with specific references to testimony and to defendant's demeanor on the witness stand the basis for her argument that the defendant tailored his testimony.

ARGUMENT

THE PROSECUTOR'S COMMENT THAT DEFENDANT HAD AND USED THE UNIQUE OPPORTUNITY TO HEAR THE OTHER WITNESSES AT TRIAL PROMOTED THE RELIABILITY OF THE TRUTH-SEEKING PROCESS AND DID NOT IMPERMISSIBLY BURDEN ANY CONSTITUTIONAL RIGHT OF DEFENDANT.

This Court has repeatedly held that it is permissible to burden the exercise of constitutional rights when the benefit to be achieved is of sufficient magnitude and the impairment of the right is not appreciable. In *Griffin v. California*, the Court struck the balance to preclude comment that transforms the exercise of the right to remain silent into substantive proof of guilt. The Second Circuit's interpretation of *Griffin* to preclude any comment on the exercise of a constitutional right failed to consider this balancing test. Application of this two-prong inquiry to the prosecutor's comments here that defendant had and used to his benefit his unique opportunity to hear the other witnesses reveals that the comments were proper. They advanced the paramount good of the criminal justice system -- the ascertainment of the truth -- and did not impermissibly burden his right to confrontation, his right to testify, or his right to due process.

I. Government Practices That Promote the Integrity of the Truth-Seeking Process Are Authorized Even When They May Discourage The Exercise Of Constitutional Rights.

This Court has recognized on many occasions that the Constitution does not preclude every government-imposed

choice on a defendant in the criminal justice system that has the tendency of discouraging the exercise of constitutional rights. *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980); *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978); *Chaffin v. Stynchombe*, 412 U.S. 17, 30 (1973). Difficult litigation choices, even those implicating rights of constitutional dimensions, do not necessarily signify constitutional transgressions. *United States v. Dunigan*, 507 U.S. 87, 96 (1993); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Rather, they are an inevitable, permissible and normal incident of criminal proceedings. *See Bordenkircher v. Hayes*, 434 U.S. at 365. Indeed, the criminal process abounds with circumstances in which difficult, and at times even unpleasant, *South Dakota v. Neville*, 459 U.S. 916, 922-923 (1983), decisions must be made. *McGautha v. California*, 402 U.S. 183, 213 (1971); *McMann v. Richardson*, 397 U.S. 759, 769 (1970).

For example, in *Bordenkircher v. Hayes*, this Court held that due process is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if he does not plead guilty, even though this practice undeniably has a discouraging effect on the defendant's assertion of his constitutionally guaranteed trial rights. 434 U.S. at 364-65. Similarly, in *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld a statute requiring pre-trial disclosure of an alibi defense even though it forced the defendant to choose between his right to remain silent and the right to present a defense. The sometimes "severe" pressure associated with such a choice did not rise to the level of a compulsion to speak.[4] *Id.* at 84.

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4. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995)(plea waiver agreements upheld); *Town of Newton v. Rumery*, 480 U.S. 386 (1987)(release-dismissal agreements upheld); *United States v. Leon*, 468 U.S. 897 (1984)(permissible to impose choice between right to testify and full expression of Fourth Amendment rights); *Corbitt v. New Jersey*, 439 U.S. 212 (1978)(upholding a statute that imposed higher sentences on defendants who went to trial than on those who entered guilty pleas); *Brady v. United States*, 397 U.S. 742, 752-753 (1970)(plea bargaining upheld even though a guilty plea waives constitutional rights); *McMann v. Richardson*, 397 U.S. 759 (1970)(plea of guilty waived right to contest voluntariness of confession).

In assessing the constitutionality of a government-imposed choice, the crucial inquiry involves a balancing of the legitimacy and necessity of the challenged action against an assessment of whether the policies undergirding the affected constitutional rights are appreciably impaired. *Jenkins v. Anderson*, 447 U.S. at 236; *Chaffin v. Stynchombe*, 412 U.S. at 32; *McGautha v. California*, 402 U.S. at 213. When a governmental practice "needlessly" impairs a constitutional right, it will be struck down. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Jackson*, 390 U.S. 570 (1968)(guilty pleas needlessly encouraged). Similarly, when governmental conduct is vindictive or has no other objective than to chill the exercise of constitutional rights or coerce their relinquishment, the practice will not be allowed to stand. *Corbitt v. New Jersey*, 439 U.S. 212, 219 n.9 (1978); *North Carolina v. Pierce*, 395 U.S. 711 (1969); *see also United States v. Goodwin*, 457 U.S. 368 (1982).

Conversely, when the benefit of the practice is of sufficient magnitude, then the burden on the constitutional right will be tolerated. In the context of the rights of the accused in the criminal justice system, the most frequently cited benefit justifying the imposition of burdens is the societal interest in the pursuit of truth and fairness in the adversarial process.

For example, while impeachment in its various forms burdens a defendant's right to testify, the interest in enhancing the reliability of the criminal process justifies the imposition of

that burden. *Jenkins v. Anderson*, 447 U.S. at 238, citing *Brown v. United States*, 356 U.S. 148 (1958). The risk of cross-examination may dissuade the exercise of the right to testify, but "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify." *McGautha v. California*, 402 U.S. at 215; *see Jenkins v. Anderson*, 447 U.S. at 238. The fundamental goal of our legal system and the fundamental purpose of a trial is the determination of truth, *United States v. Havens*, 446 U.S. 620, 626 (1980); *Tehan v. United States*, 382 U.S. 406, 416 (1966), and vital to this is the role of cross-examination of the accused. *Perry v. Leake*, 488 U.S. 272, 282 n.7 (1989). So compelling is this interest that for over a century this Court has remarked that there is "no reason" why a defendant who testifies should be treated any differently than other witnesses. *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1899); *see Brown v. United States*, 356 U.S. 148, 159 (1958); *Reagan v. United States*, 157 U.S. 301, 305 (1895). "Assuming the position of a witness, he [an accused] is entitled to all its rights and protections, and is subject to all its criticisms and burdens." *Reagan v. United States*, 157 U.S. at 305. Thus, in support of this valued societal goal, various methods of impeachment, even those implicating other constitutional rights, are authorized despite their creation of disincentives to testify.[5]

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5. A defendant may be impeached with evidence obtained in violation of his Sixth Amendment rights, *Michigan v. Harvey*, 494 U.S. 344 (1990); *Oregon v. Haas*, 420 U.S. 714 (1975); evidence obtained in violation of his Fourth Amendment rights, *United States v. Leon*, 468 U.S. 897 (1984); evidence obtained in violation of his *Miranda* rights, *Harris v. New York*, 401 U.S. 222 (1971); evidence of prior bad acts, *Old Chief v. United States*, __U.S__, 117 S.Ct. 644 (1997); *Spencer v. State v. Texas*, 385 U.S. 554 (1967); proof of pre-arrest silence, *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); post-arrest silence in the absence of *Miranda* warnings, *Fletcher v. Weir*, 455 U.S. 603, 606-607 (1982); inconsistent statements, *Jenkins v. Anderson, 447 U.S. at 239*; and,

Indeed, even practices that impose a burden on the accused simply because of his status as a defendant are permitted when they serve the fundamental goal of truth-seeking, despite their purported chilling effect on the right to testify or to mount a defense. For example, because it "is within the province of the court to call the attention of the jury to any matters which legitimately affect his [a defendant's] testimony and his credibility," and because the interest of the defendant in the outcome of the case "is of a character possessed by no other witness," a trial court may routinely instruct the jury, when a defendant testifies, that the defendant's interest in the outcome of the case may be considered in assessing his credibility. *Reagan v. United States*, 157 U.S. 301, 305 (1895); *see United States v. Sullivan*, 919 F.2d 1403, 1419 (10th Cir. 1990); *United States v. Gleason*, 616 F.2d 2, 15-16 (2d Cir. 1980); *Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969); *see also* Modern Federal Jury Instructions 1991, FJC 30-31 (Federal Judicial Center; Matthew Bender).

Nor is the right to testify the only one that may be burdened in the advancement of the truth-seeking function of the trial. Practices that tend to burden the right to be present are authorized when they are necessary to the ascertainment of the truth or the fair and reliable administration of justice. *People v. Buckey*, 424 Mich. 1, 378 N.W. 2d 432, 439 (1985). For example, because of his status as an accused who is present in the courtroom, a defendant may be forced "to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber v. California*, 384 U.S. 757, 764 (1966). *See generally* 3 Joseph G. Cook, Constitutional Rights of the Accused, Section 21.3,

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omissions in testimony, *Caminetti v. United States*, 242 U.S. 470 (1916).

pp. 21-11-21-16 (3rd Ed.1996). Also, where justification is shown, the shackling of a defendant will be upheld though it compels an election between exercising the rights of confrontation and presence subject to the prejudice resulting from the jury's observation of the restraint, or forfeiting those rights altogether. *Estelle v. Williams*, 425 U.S. 501 (1976); *Illinois v. Allen*, 397 U.S. 337 (1970).

And practices that tend to pressure a defendant into relinquishing the right to remain silent have withstood attack as forms of constitutional compulsion when they further the truth-seeking function of the trial. For example, a jury may be instructed that a presumption of guilty knowledge may be inferred from a defendant's unexplained possession of contraband. *See, e.g.*, 1 Leonard B. Sand et. al, Modern Federal Jury Instructions, Section 6.02 (1991); 1 Edward J. Devitt et. al, Federal Jury Practice and Instructions, Section 16.10, pp. 591-592 (1992). While a presumption of this kind heightens the incentive to testify and may have the practical effect of compelling a defendant to testify to rebut the presumption, such presumptions have been upheld. *Barnes v. United States*, 412 U.S. 837 (1973); *Yee Hem v. United States*, 268 U.S. 178 (1925); *see County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979)(upholding automobile/gun presumption); *see also* 1 Charles E. Torcia, Wharton's Criminal Evidence, Sections 89-150 (13th Ed. 1972)(detailing myriad constitutional presumptions).

Even apparent burdens on the right to counsel may be imposed in order to further the ascertainment of the truth or the fair administration of justice. For example, a defendant may be cross-examined regarding whether he had been coached by counsel during a break in his testimony despite the apparent burden on the right to counsel. *Geders v. United States*, 425

U.S. 80, 89 (1976). Also, a defendant wishing to proceed pro se may be forced to choose between exercising the right to proceed pro se with the unsolicited participation of standby counsel or not exercising the right at all. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

In applying the balancing test, it is vital to distinguish between an imposition on a constitutional right and a restriction on the defendant's ability to use that right affirmatively to obtain an advantage to which he is not constitutionally entitled.

The constitutional protections are designed to insulate an accused from governmental abuses and overreaching, and not to endow the accused with litigation advantages. The reason is that in order to foster "society's interest in the administration of justice," *Rushen v. Spain*, 464 U.S. 114, 118 (1983), and both fairness and reliability in the ascertainment of guilt and innocence, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and the arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). "[J]ustice, though due to the accused is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

While zealous to safeguard constitutional protections, this Court has been equally vigilante in thwarting efforts by defendants to avail themselves of tactical advantages lacking a constitutional predicate through the guise of an assertion of a constitutional right. For example, whereas it is improper to draw an adverse inference from the assertion of the "constitutional shield" of the Fifth Amendment, *Mitchell v. United States*, __ U.S. __, 119 S.Ct. 1307, 1312 (1999), this Court has restricted the attempt to use that protection as a

"sword" insulated from prosecutorial response when a defendant denies he had an opportunity to explain his actions. *United States v. Robinson*, 485 U.S. 25, 33-34 (1988). Similarly, while a defendant possesses the right to present a defense under the Sixth Amendment, "the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial process; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241 (1975).

In the same vein, while a defendant is privileged to testify in his own behalf, he has the obligation to speak truthfully. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986); *Harris v. New York*, 401 U.S. 643, 645 (1971). Consequently, a defendant is proscribed from exercising his Fourth (*Walder v. United States*, 347 U.S. 62 [1954]), Fifth (*United States v. Dunigan*, 507 U.S. 87 [1993]; *Brown v. United States*, 356 U.S. 148, 155-156 [1958]), and Sixth Amendment rights (*Nix v. Whiteside*, 475 U.S. at 173; *Michigan v. Harvey*, 494 U.S. 344, 350-351 [1990]), as well as his *Miranda* rights (*Wainright v. Greenfield*, 474 U.S. 284, 292 n.8 (1986); *Harris v. New York*, 401 U.S. 222 [1971]) as licenses to commit perjury free from the risk of impeachment designed to detect the falsehoods. To rule otherwise would be to transform these protections from "humane safeguard[s]" into "positive invitation[s] to mutilate the truth." *Brown v. United States*, 356 U.S. at 156. Thus, no impairment of a constitutional right occurs when the government practice merely restricts a defendant's attempt to skew the level playing field upon which the issue of culpability is resolved.

This Court applied the balancing test described-above in *Griffin v. California*, to prohibit a prosecutor or a court from

suggesting to a jury that an inference of guilt may be drawn from a defendant's assertion of his Fifth Amendment right to remain silent. This type of comment "cuts down on the privilege by making its assertion costly" and is a "remnant of the 'inquisitorial system of criminal justice'" that subjects the accused to "a penalty imposed for exercising a constitutional privilege." 380 U.S.at 614.

The *Griffin* prohibition recognizes that the ills associated with such comments far outweigh any benefit. First, the policies underlying the Fifth Amendment protection are severely undermined by such comment. The "historic function of the privilege has been to protect a 'natural individual from compulsory incrimination through his own testimony or personal records." *Andersen v. Maryland*, 427 U.S. 463, 470 (1976).[6] Compulsory incrimination offends our sense of fair play and "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) .

By asking the jury to infer guilt through a defendant's silence, a prosecutor transforms a silent defendant into a "source of evidence against himself." Albert W. Alschuler, "A Peculiar Privilege In Historical Perspective: The Right to Remain Silent," 94 Mich. L. Rev. 2625, 2627 (Aug.1996). This is because a defendant's failure to testify is "a fact inescapably impressed on the jury's consciousness," *Griffin* at 621, 622, and the "layman's natural first suggestion would probably be that the resort to

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6. *See generally* 8 John T. McNaughton, Wigmore, Evidence in Trials at Common Law, Section 2251 (1961 & Supp.1995); Roderick R. Ingram, "A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials," 5 Wm. & Mary Bill of Rts. J. 299, 301 (Wint.96); John H. Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," 92 Mich. L. Rev. 1047 (March1994).

privilege in each instance is a clear confession of crime." 8 John T. McNaughton, Wigmore Evidence in Trials and Common Law, Section 2272 (1961 & Supp. 1995); *see Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978).

This burden is made weightier by the accused's inability to offset that adverse inference absent total relinquishment of the right to remain silent. Unless the accused takes the stand, his attorney is bereft of admissible evidence upon which to rely in challenging the inference.

Second, such comments do not appreciably advance the truth-seeking process. This Court has recognized that myriad reasons exist unconnected with culpability for declining to testify, and therefore the inference of guilt drawn from the silence is infused with unreliability.[7] Thus, in the absence of a benefit to be derived from the inference, the burden is "needlessly" or unnecessarily imposed, a factor requiring its prohibition. *See United States v. Jackson*, 390 U.S. at 570.

Thus, in *Griffin*, the Court condemned a practice that led to the complete nullification of a constitutional guarantee without any offsetting benefit. The case does not stand for the broad proposition attributed to it by the Second Circuit that any comment on the exercise of a constitutional right is prohibited. Rather, *Griffin*, which this Court has stated should be narrowly construed, *see United States v. Robinson*, 485 U.S. at 31, merely represents an application of the balancing test that must

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7. These reasons include "[e]xcessive timidity" and "nervousness,"*Wilson v. United States*, 149 U.S. 60, 66 (1893), as well as fear of impeachment by prior bad acts and convictions or other harmful information not necessarily relevant to the accusations being tried. *Carter v. Kentucky*, 450 U.S. 288, 300n.15 (1981).

be used in determining the propriety of any burden on the exercise of a constitutional right.[8]

II. The Prosecutor's Comments Properly Furthered The Fundamental Societal Interest In The Determination of Truth.

Application of this Court's balancing test compels the conclusion that the comments in this case were proper.

Quite unlike in *Griffin*, the prosecutor's comments in *Agard* materially advanced the broad fundamental societal interest in the ascertainment of the truth at trial. They alerted the jury to a fact touching directly upon the reliability of the evidence at trial, that being defendant's immunity from the witness-sequestration rule and its concomitant impact on his credibility. *See State v. Hoxie*, 101 N.M. 7, 677 P.2d 620, 622 (1984); *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432 (1985).

It has been recognized since biblical times that the failure to insulate a witness from other testimony at trial detrimentally

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8. This Court has repeatedly refused to extend *Griffin* to disparate factual scenarios. *See, e.g., United States v. Robinson*, 485 U.S. 25 (1988)(court declined to extend *Griffin* to bar prosecutor's summation comments that were invited by arguments of defense counsel); *Baxter v. Palmigliano*, 425 U.S. 308 (1976)(Court declined to extend *Griffin* to prison disciplinary proceedings); *see also United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996)(court declined to extend Griffin to prosecutor's reference in summation to the"uncontradicted evidence"). Indeed, recently one member of this Court described *Griffin* as a "wrong turn" which is "cause enough to resist its extension." *Mitchell v. United States*, __ U.S. __, 119 S.Ct. 1307, 1319 (1999)(Scalia, J. dissenting). The holding has been the source of controversy. *See Office of Legal Policy U.S. Department of Justice, Report to the Attorney General on Adverse Inferences from Silence: Truth In Criminal Justice Report* No. 8 (1989), 22 Mich. J.L. Ref. 1005, 1095 (1989).

affects the witness's reliability. *United States v. Jackson*, 60 F.3d 128, 133 (2d Cir.1995); *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992); 6 James H. Chadbourn, Wigmore, Evidence in Trials at Common Law, Section 1837, p.455 (1974). Hence, the practice was instituted of sequestering witnesses. The reason for this practice is twofold: it "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." As stated by Wigmore, "[i]f the hearing of an opposing witness were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." 6 James H. Chadbourn, Wigmore, Evidence in Trials at Common Law, Section 1838, p. 461 (1974). Also, even innocent alterations of testimony are prevented by this rule, for it is recognized that unsequestered witnesses may be influenced subconsciously. 1 John William Strong, McCormick On Evidence Section 50, p. 188 (4th Ed. 1992). The importance of this rule to the integrity of the trial process is so profound that statutory law allows a litigant to demand sequestering as a matter of right, rather than leaving it to the decision of the trial court. F.R.Cr.Pr. 615.

The accused is exempt from this otherwise strict rule in order to give expression to his right to confront the witnesses against him, *Perry v. Leeke*, 488 U.S. 272, 282 (1989), and full effect to his Fifth Amendment right to testify or remain silent. In the latter context, a defendant is permitted to hear the case against him in full in order to determine whether or not his testimony will be necessary or even helpful to his case. *Lakeside v. Oregon*, 435 U.S. 333, 339 n.9 (1978); *Brooks v. Tennessee*, 406 U.S. 605, 610-611 (1972).

The defendant's right to hear the testimony of other witnesses, however, does not render him immune from the possibilities of tailoring or innocent confabulation. Because this fact goes to the heart of his reliability as a witness, the jury should be allowed to consider it. Where a non-defendant witness is exposed to the testimony of another, that fact may be brought to the jury's attention through cross-examination, *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir.1994); *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir.1991), through summation comments, *Holder v. United States*, 150 U.S. 91, 92 (1893); *United States v. Johnson*, 578 F.2d 1352, 1355 (10th Cir.1978), and even through court instruction. *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir.1997); *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997); *United States v. Binetti*, 547 F.2d 265, 269 (5th Cir. 1977); 1 John William Strong, *McCormick On Evidence*, Section 50, p.191 (4th ed. 1992). There is no reason for excepting a defendant from these rules and preventing the jury from considering whether or not the individual who typically is "the most important witness for the defense," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), has tailored his testimony due to his presence or was influenced by that fact. *State v. Robinson*, 157 N.J. 118, 384 A.2d 569 (1978); *State v. Smith*, 82 Wash.App. 327, 917 P.2d 1108 (1996); *State v. Howard*, 323 N.W.2d 872, 874 (1982); Peter Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 969 (1978).

Notably, this Court has ruled this way in determining the defendant's rights with regard to a corollary to the sequestration rule that prohibits contact between prospective witnesses and third parties who are aware of testimony already given. As previously noted in *Perry v. Leeke*, 488 U.S. at 272, this Court held that a defendant may be restricted from contact with his

own attorney during a brief (not overnight) recess in his testimony. The reason: when the defendant "assumes the role of a witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial -- are generally applicable to him as well." 488 U.S. at 282-283. This is despite the seeming burden on a defendant's right to counsel. There is no rational distinction between the practice sanctioned in *Perry* and the one advocated by petitioner in this case.

Thus, rather than being "needless" or existing solely to chill the exercise of a constitutional right, prosecutorial comment on the defendant's opportunity to hear and use other testimony promotes the central goal of the criminal justice system, the ascertainment of truth.

III. The Prosecutor's Comments Did Not Deprive Defendant of Any Constitutionally Protected Right Nor Impose An Undue Burden on the Exercise of Any Right.

The prosecutor's comments in this case, unlike those in *Griffin*, did not directly impair any constitutional right of the defendant or render the assertion "costly." Defendant was afforded all the attributes of the right to confront the witnesses against him, to testify in his own behalf, and to a fair trial under the Due Process clause. The comment, in fact, helped advance goals shared by these constitutional provisions. To the extent that defendant faced the prospect that the jury would consider his opportunity to fabricate, that likelihood did not encourage him to surrender his confrontation rights or to refrain from

testifying, nor did it imply to the jury that he was guilty simply because he exercised those rights.[9]

A. The Confrontation Claim

The defendant was provided with the fullness of his rights under the Confrontation Clause notwithstanding the prosecutor's comments. Moreover, at no time did the prosecutor suggest that defendant was guilty simply because he attended his own trial, and unlike in *Griffin*, defendant had ample opportunity to offset the impact of the prosecutor's remarks. Consequently, the Second Circuit's finding of a confrontation right violation was erroneous.

As a threshold matter, defendant was afforded all of the protections that the Confrontation Clause guarantees. The right of confrontation can be traced back to the practices of the ancient Hebrews and Romans and into the sixteenth century.

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9. A number of courts have upheld the practice of referring during cross-examination or summation to a defendant's opportunity to hear other testimony. *See United States v. Warren*, 973 F.2d 1304, 1307 (6th Cir. 1992); *State v. Buggs*, 581 N.W.2d 329 (1998); *State v. Smith*, 82 Wash. App. 327, 917 P.2d 1108 (1996); *Davis v. State*, 221 Ga. App. 131, 470 S.E.2d 520, 522-523 (1996); *State v. Grilli*, 369 N.W.2d 35, 37 (Minn. 1985); *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984); *State v. Hoxie*, 101 N.M. 7, 677 P.2d 620, 622 (1984); *Reed v. State*, 633 S.W.2d 664, 666 (Tex.1982); *State v. Howard*, 323 N.W.2d 872, 874 (1982); *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569 (1978); *but see State v. Walker*, 972 S.W.2d 623 (Mo.1998); *Commonwealth v. Jones*, 45 Mass. App. 254, 697 N.E.2d 140 (1998); *State v. Cassidy*, 236 Conn. 112, 672 A.2d 899 (1996); *State v. Johnson*, 80 Wash. App. 337, 908 P.2d 900 (1996); *State v. Jones*, 580 A. 2d 161 (Me. 1990); *State v. Hemingway*, 148 Vt. 90, 528 A.2d 746 (1987); *People v. Person*, 400 Mass. 176, 508 N.E. 88 (1987); *Sherrod v. United States*, 478 A.2d 644, 654 (D.C.1984); *Dyson v. United States*, 418 A.2d 127 (D.C.1980).

See Coy v. Iowa, 487 U.S. at 1015-106.[10] An extended period transpired, however, where the right was sharply curtailed, and the practice was implemented of trying defendants solely on the basis of ex parte affidavits or depositions obtained by magistrates, which were merely referred to at the proceeding. *California v. Green*, 399 U.S. 149, 156-157 (1970); *see also White v. Illinois*, 502 U.S. at 359 (Thomas, J. concurring). Even when the procedures evolved to the use of live witnesses, the accused merely attended his own trial in order to observe the witnesses being sworn so that he could challenge on a number of grounds the competency of the witnesses to stand against him. It did not include the right to hear the witnesses while they testified.[11]

This changed with the advent of the Confrontation Clause. Because early American documents rarely mention the confrontation right,[12] and since it was the result of only five minutes debate before its adoption by Congress,[13] scant evidence exists to illumine the intention of the drafters of this

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10. Richard D. Friedman, Confrontation: The Search For Basic Principles, 86 Geo. L.J. 1011, 1022-102 (Feb.1998); Frank R. Hermann, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l. L. 481, 482-486 (Spr.94); Daniel Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. of Public Law 381, 384 (1959).

11. Frank Hermann and Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. Jnl. Int'l. L. 481, 518-522, 540-541 (Spr.1994)

12. Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77 (Fall1995), citing Murl A. Larkin, The Right of Confrontation: What's Next?, 1 Tex. Tech. L. Rev. 67 (1969).

13. Howard W. Gutman, Academic Determinism: The Division of the Bill of Rights, 54 S.Cal. L. Rev. 295, 332-43 (1981), cited in, Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 737 (1993).

constitutional safeguard. Hence, it "comes to us on faded parchment." *California v. Green*, 399 U.S. at 174-175 (Harlan, J. concurring). In an evolving process, however, this Court has delineated three essential components of the right of confrontation: (1) having the competent witness testify under oath in order to impress upon him the seriousness of his task and to guard against falsehoods by the possibility of a sanction for perjury; (2) cross-examination, which has been described as the "main and essential purpose of confrontation," *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974); and, (3) observation of demeanor by the accused and the trier of fact. *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. at 1017-1018; *California v. Green*, 399 U.S. at 157-158; *Dowdell v. United States*, 221 U.S. 325, 330 (1910). The Confrontation Clause is generally satisfied when these three components are extant. *Ohio v. Roberts*, 448 U.S. 56, 69 (1980); *Maryland v. Craig*, 497 U.S. at 847.

Here, all of the demands of the Confrontation Clause were satisfied. The witnesses all testified under oath; they were subject to cross-examination; and, the jury, defendant and the judge all fully observed their demeanor. Thus, the explicit constitutional guarantee and its defined components were wholly observed. *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569 (1978).

The prosecutor's comments merely deprived defendant of what was characterized by the Second Circuit as the "constitutional right to the opportunity to fabricate or conform testimony without comment." *Agard*, 117 F.3d at 710 n.11. Yet there is no such right.

Certainly such a right is not identified within the contours of the Confrontation Clause as delineated by this Court. Moreover, it is not reasonable to suggest that the drafters of the Confrontation Clause, offended by the unfairness of an accused blindly combating ex parte affidavits, meant to swing the pendulum so far as to bestow upon a defendant a litigation boon consisting of the ability to fabricate without challenge. A defendant's presence at trial is meant to give meaning to his right of confrontation and to enable him to decide whether or not to exercise his right to testify. See pp. 27-28, *supra*. It is not designed to enable him to decide what to testify to or what defense to muster "reliant on the prosecutor's disability to challenge his testimony." *Walder v. United States*, 347 U.S. 62, 65 (1953). To rule otherwise would indeed be to transform the confrontation right into a "positive invitation to mutilate the truth." *Brown v. United States, 356 U.S. at 156.*

Thus, the "constitutional right" identified by the Second Circuit should be rejected for what it truly is: the unacceptable ability to "frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle v. Ohio*, 426 U.S. 610, 617 n. 7 (1976); *see State v. Smith*, 82 Wash.App. 327, 917 P.2d 1108, 1111-1112 (1996); *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432 (1985). Deprived merely of this, defendant's confrontation right was not "penalized" at all by the prosecutor's comment and hence the remarks were not constitutionally objectionable. *See South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983)(where suspect lacked constitutional right to refuse to take a blood-alcohol test, it was permissible to draw an adverse inference from his refusal to do so); *Williams v. Florida*, 399 U.S. at 78 (upheld right to compel defendant to file pretrial alibi notice on ground that depriving defendant of the "right to surprise the

State with an alibi defense" was not protected by the Fifth Amendment).[14]

In determining that defendant's confrontation right was unduly penalized, the Second Circuit nevertheless found that the prosecutor's comments attached a burden to the exercise of defendant's confrontation right. The court remarked that the prosecutor's comments implied that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, and then found a valid comparison to the harmful inference in *Griffin*. The inference to be drawn from the prosecutor's comments here, however, stands in stark contrast to the naturally flowing and pejorative inference of guilt in *Griffin*. *See United States v. Francis*, 82 F.3d 77, 79 (4th Cir.1996); *Resnover v. Pearson*, 965 F.2d 1453, 1465 (7th Cir.1992). The prosecutor did not ask the jurors explicitly or implicitly to infer guilt based upon the defendant's exercise of his confrontation right. Perhaps the analogy to *Griffin* would be more cogent had she stood before the jury and argued that if defendant was innocent he would have not have attended his own trial or have testified in his own behalf. *People v. Buckey*, 378 N.W. 2d at 432. But such direct comment was absent.

Moreover, as the dissent below states, it would "belittle" (117 F.3d at 719) the "sound common sense" of jurors, "the most valuable feature of the jury system," (*Dunlop v. United*

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14. Thus, on the landscape of the law relating to the Confrontation Clause, the Second Circuit has erected the following standard: while a defendant's confrontation right is not necessarily violated where he is denied a face-to-face encounter with his accusers, *see Maryland v. Craig*, 497 U.S. at 836; *Coy v. Iowa*, 487 U.S. at 1012, or even where he is banned from the courtroom altogether, *see Illinois v. Allen, 397 U.S. 337 (1970)*, it is nullified when the prosecutor merely assails the defendant's conversion of the constitutional safeguard into a tactical advantage.

States, 165 U.S. 486, 500 [1897]), to conclude that the jurors inferred from the prosecutor's comments that the only reason the defendant exercised his right to attend his own trial (and testify), was because he was guilty. Jurors expect a defendant to attend his own trial. That this is so is demonstrated by the fact that jurors are instructed against drawing an adverse inference when the defendant is absent from his trial. *See* 1 Comm. On Criminal Jury Instructions of the Office of Court Administration, *Criminal Jury Instructions* New York, Section 4.22 (1st ed. 1983). Similarly, that the adverse inference naturally, and perhaps inevitably, drawn from a failure to testify is greater than the one suggested by the Second Circuit is proven by the need to instruct a jury that they are to draw no inference from a defendant's failure to testify. *Carter v. Kentucky*, 450 U.S. at 288; *Lakeside v. Oregon*, 435 U.S. at 333. No one has ever seriously suggested that an adverse-inference charge is required when a defendant attends his own trial.

Additionally, the defendant had ample opportunities to offset any such inference that the jury might have drawn. Because the order of trial and the power to reopen the case rests within the discretion of the trial court, *Thiede v. Utah Territory*, 159 U.S. 510, 519 (1895); *United States v. Matsushita*, 794 F.2d 46, 51-52 (2d Cir. 1986), defense counsel could have moved to reopen the case after closing argument, *Morris v. Slappy*, 461 U.S. 1, 13 n.5 (1983); after the case had been submitted to the jury, *United States v. Bayer*, 331 U.S. 532, 539 (1947); *Blissett v. Lefevre*, 924 F.2d 434, 439 (2d Cir.1991); and, even after supplemental jury instructions. *United States v. Smith*, 44 F.3d 1259, 1271 (4th Cir. 1995); *see also Goldsby v. United States*, 160 U.S. 70, 74 (1895)(in sound discretion of court to admit rebuttal evidence). But he never moved to do so. This stands in stark contrast to *Griffin*, who

was unable to counter the prosecutor's summation comments without relinquishing his right to remain silent.[15]

Finally, far from impairing the policies underlying the right of confrontation, the comments here furthered a central goal shared by that constitutional provision. The Confrontation Clause was designed to supplant the historic practice of trial by depositions and ex parte affidavits with a system involving live testimony under oath, subject to cross-examination, and with demeanor bared to the watchful eyes of the trier of fact. *Mattox v. United States*, 156 U.S. 237, 242-243 (1895). As this Court has remarked, the primary object of the Confrontation Clause is "the search for truth," *Douglas v. Alabama*, 380 U.S. 415, 418-419 (1965), and its paramount concern the "accuracy of the truth-determining process." *Maryland v. Craig*, 497 U.S. at 846-847 (citation omitted). Cross-examination, as well as the other attributes of the right, are indeed valued so highly precisely because they help insure the accuracy of the result at trial. *White v. Illinois*, 502 U.S. 346, 356-357 (1992); *Lee v. Illinois*, 476 U.S. 530, 540-541 (1986).[16] The prosecutor's comments here, designed to alert the jury's attention to a factor bearing directly on defendant's credibility, served this same end, and, thus, advanced a primary goal of the right allegedly violated.

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15. Considering how he himself sounded the theme of "fabrication" from the outset of the trial, defense counsel could hardly have been surprised by the prosecutor's remarks. Moreover, it is the role of a defense attorney to anticipate what arguments will be made. *See McMann v. Richardson*, 397 U.S. 759, 769-770 (1970).

16. Carolyn M. Nichols, The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law, 26 N.M. L. Rev. 393 (Summer1996); 5 James H. Chadbourne, Wigmore Evidence in Trials at Common Law, Section 1395 (1974).

B. The Right To Testify

Citing *Griffin*, the Second Circuit concluded that the prosecutor's comments inappropriately "chilled" defendant's right to testify because comments of that type compel an accused to either forgo the right or be inappropriately attacked. This facile reliance on *Griffin* was misplaced.

Rather than being "chilled" in any respect, defendant's right to testify was merely subjected to the normal truth-seeking devices that receive constitutional approval. Despite its magnitude, the right to testify is not without limitations, and may "bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. at 55-56; *see United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998). As demonstrated above, society's paramount and fundamental goal in obtaining the truth through a rigorous adversarial process is such a legitimate interest, and that interest is served by allowing full impeachment of a defendant's credibility much in the way any other witness' veracity and believability are assailed.

Commenting on a defendant's credibility by arguing that his testimony is tailored based upon his advantage in observing the testimony of the other witnesses is no greater burden on the right to testify than any of the myriad constitutionally sound impeachment tools at a prosecutor's disposal. *See* pp. 18-20, *supra*. If anything, the prosecutor's comments were less burdensome than an interested witness charge considering that the arguments of counsel lack the impact and influence of a court's instructions. *See Carter v. Kentucky*, 450 U.S. 288, 304 (1981); *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978). The mere fact that the defendant is compelled to weigh the risk of being accused of tailoring merely implicates a tactical issue

and is no more coercive than his having to calculate the risks involved with these other forms of impeachment.

Also, the weight of the inference to be drawn from the comments herein can hardly be compared to that in *Griffin*. The prosecutor merely argued that the defendant wrongfully conformed his testimony around that of the prosecution witnesses. She never asked the jury to infer guilt based upon defendant's act of testifying in his own behalf; nor did the jury, nor would any jury, do so. The natural assumption of guilt is drawn from a defendant's failure to testify, not the act of testifying. Indeed, *Griffin* was based on that assumption.

Finally, the Second Circuit's conclusion cannot be reconciled with the history of the right to testify. At common law, the accused was not permitted to testify due to the fear that his interest in the outcome, like other parties, "might tend to a perversion of the truth." *Reagan v. United States*, 157 U.S. at 306; *see Rock v. Arkansas*, 483 U.S. at 49-50; *Nix v. Whiteside*, 475 U.S. at 164; *Carter v. Kentucky*, 450 U.S. at 296 n.9. It is doubtful that the drafters of the Constitution, who, in allowing a defendant to testify, tolerated the unreliability born of his interest in the outcome while intending to disable prosecutors from impeaching his reliability based upon his exposure to the testimony.

C. The Due Process Issue

In finding a due process violation, the Second Circuit assumed the existence of a *Griffin*-like error. Rather than engaging in any independent analysis to conclude that the prosecutor committed error, the court simply asserted, "A comment which directly disparages the defendant's exercise of constitutional rights can be severe misconduct regardless of its

length" and compromises "the very fairness of the entire trial." 117 F.3d at 713. However, *Griffin* was not premised on a due process violation; in fact, no such claim was ever raised in *Griffin*. *Griffin*, 380 U.S. at 619 (Stewart, J., dissenting). Thus, the Second Circuit's assumption of error cannot serve as the basis for the conclusion that the defendant's due process rights were violated.

Moreover, even assuming that the prosecutor's comments were objectionable, the comments did not affect the fairness of the trial. The comments were invited by the remarks of defense counsel; the remarks were brief and isolated; the proof of guilt was strong; and, the court gave adequate guidance to the jury concerning the effect to be given the remarks.

Even assuming that error occurred here, not every trial error by a prosecutor results in a denial of constitutional due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-648 (1974). It is "not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). The only question relevant for review is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643.

Indeed, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *see also Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ("the law does not require that a defendant receive a perfect trial, only a fair one"); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (same). And "the appropriate standard for review on a writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory

power." *Darden v. Wainwright*, 477 U.S. at 181, quoting *Donnelly*, 416 U.S. at 642.

Several reasons support the conclusion that the prosecutor's comments did not contaminate defendant's trial. First, the remarks of the prosecutor were invited by defense counsel. Although the invited response doctrine cannot be used to "excuse improper comments," it can be used "to determine their effect on the trial as a whole." *Darden*, 477 U.S. at 182, citing *United States v. Young*, 470 U.S. 1 (1985). Under this doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal so long as the prosecutor's response, when viewed in the context of the trial and the defense arguments, is a reasonable one. *Young*, 470 U.S. 1, 11-12 (1985); *Lawn v. United States*, 355 U.S. 339, 359 n.15 (1958). Considering the provocation by the defense attorney in this case, the prosecutor's tailoring argument was "invited."

From the outset, defense counsel pressed the claim that the prosecution witnesses had collaborated in fabricating a case against defendant and that Agard's testimony was more credible and consistent than theirs. Throughout the trial he attacked them as liars, characterized their testimony as scripted, and spoke of how Ms. Winder lied because the truth "did not fit her story." Through her claim that defendant had tailored his testimony, the prosecutor was merely "accepting the challenge," *Crumpton v. United States*, 138 U.S. 361, 364 (1891) laid down by defense counsel and attempting to "right the scale." *Young*, 470 U.S. at 14. Considering that the "adversary system permits a prosecutor to 'prosecute with earnestness and vigor,'" *United States v. Young*, 470 U.S. at 7, and the wide latitude given to attorneys in responding to argument, *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Coleman*, 7

F.3d 1500, 1506 n.4 (10th Cir. 1993), this response was proper. *United States v. Robinson*, 485 U.S. at 25 (court rejected *Griffin* violation as basis for reversal where remarks were invited).

Second, the proof of guilt was strong, described by the state appellate court as "overwhelming." This minimized the likelihood that the prosecutor's remarks infected the entire trial. Identity was not at issue -- defendant conceded that he had a sexual encounter with the victim. Moreover, the victim's claim of a forced sexual encounter was substantiated by a wealth of independent evidence. The photographs of her taken the day after the crime and weeks later showed the lingering effects of the battering visited upon her by defendant. Medical testimony and records and the testimony of the assigned detective concerning the nature and extent of the victim's injuries further supported the victim's claim that there was a forcible sexual encounter. Also, defendant himself supplied inculpatory evidence that weakened his own claim that the sexual encounter was consensual. This consisted of both his apology to the victim the day after the attack for being a "golden asshole," and his false statements to the assigned detective concerning his possession of the weapon that he used to threaten the victim. In light of this proof, it is unreasonable to assume that the jury would have acquitted defendant of all counts had the prosecutor not made the challenged remarks.

Third, instructions by the trial court also minimized the impact of the prosecutor's remarks. The trial court repeatedly defined "evidence" for the jury (Record: 3-4, 830, 831), instructed the jury that it was only to consider the evidence in rendering a verdict (Record: 826, 827, 843), and emphasized that the arguments of counsel, which the jurors were free to reject, did not constitute evidence (Record: 2, 828, 847).

Additionally, the court incessantly instructed the jurors that they were the sole and exclusive judges of the facts (Record: 825, 828, 830, 831-832, 846-847), and that it was their "recollection, understanding and evaluation of the facts" that controlled regardless of the arguments of counsel or comments of the court (Record: 827). The trial court even interrupted the prosecutor's summation to reiterate this point (Record: 789). These firm instructions adequately alerted the jury to the minimal weight to accord the prosecutor's comments. *See Darden v. Wainright*, 477 U.S. 168 (1986).

This finding is consistent with the "crucial assumption" that juries are presumed to follow their instructions. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *Parker v. Randolph*, 442 U.S. 62, 73 (1979). Indeed, this Court has presumed "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. at 324 n.9. This rule "is a pragmatic one, rooted less in the absolute certitude the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal process." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *see Shannon v. United States*, 512 U.S. 573, 586 (1994). Applying these principles here establishes that, contrary to the Second Circuit's decision, the trial court's final charge sufficiently protected defendant's right to a fair trial.[17]

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17. The fact that these instructions were delivered as part of the final charge to the jury does not lessen their impact. Indeed, without applying the assumption that juries follow instructions to the court's final charge, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. *Parker*

Fourth, it is significant that the defendant merely claims that the single remark at issue here was erroneous. This remark occurred over the course of a ten-day trial that consumed over 1100 pages of transcript. It cannot be said that the "[i]solated passage of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence" was worthy of the issuance of a writ. *Donnelly v. Christoforo,* 416 U.S. at 646.

Finally, it is apparent that the prosecutor's remarks did not cause the jury to wholly reject defendant's testimony. The jury requested that his testimony be read back during deliberations (Record: 969). Moreover, it is evident that the jury carefully scrutinized the evidence; it sent out a total of ten notes requesting readbacks of testimony and instructions on the law over a period of four days. In fact, the trial judge noted that the jury had asked for every item of evidence and for almost all the testimony (Record: 1018). Further, although the jury deliberated on counts of rape, sodomy, and assault, it nevertheless acquitted defendant of all charges but Sodomy in the First Degree and Criminal Possession of a Weapon in the Third Degree. This discriminating verdict demonstrates that the defendant received all he was entitled to -- an impartial jury that carefully examined the charges and evidence against him before returning its verdict.

IV. No Factual Predicate Is Required to Comment on a Defendant's Opportunity to Hear Testimony; Moreover, the Prosecutor Provided a Factual Basis for Her Comments That Defendant Tailored His Testimony.

Upon attempting to narrow the scope of its rule, the Second Circuit stated that the prosecutor's error took the form

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v. Randolph, 442 U.S. at 74.

of failing to establish a factual predicate for the summation argument. The court disparaged the prosecutor's comment on defendant's opportunity to hear the other witnesses, holding that a specific showing of a "fit between the testimony of the defendant and other witnesses" was required. This was error.

At the outset, no factual predicate, other than a showing that the defendant was present during the taking of testimony, is required to comment merely upon a defendant's opportunity to hear other witnesses and the concomitant impact on his credibility. This is because every defendant who is exposed to the testimony of another is susceptible to the ills of innocent confabulation and the temptation to tailor. This is no different than defendants who are unaffected by their interests in the outcome of the case being subjected to an interested witness charge. Just as an interested witness charge may be delivered in every case, leaving the jury to assess the weight to be accorded this motive in the individual case, *Reagan v. United States*, 157 U.S. at 305, a comment on defendant's exposure to other witnesses may be made as a matter of course, leaving the jury to assess the impact of that exposure in the case before it.

Indeed, as the Second Circuit has acknowledged, it is virtually impossible to determine how a person's testimony is affected by having heard other witnesses. As that court has stated, "only with 20/20 hindsight could a party demonstrate what would have been said had a witness been sequestered." *United States v. Jackson*, 60 F.3d 128, 136-137 (2d Cir. 1995). Yet in the context presented here, the Second Circuit requires a prosecutor to possess "20/20 hindsight" as a predicate to making argument on the mere opportunity to hear testimony.

Moreover, the Second Circuit's requirement of a showing of a "fit" between a defendant's testimony and that of

other witnesses as a prerequisite to accusing a defendant of tailoring his testimony ignores the role demeanor plays in a jury's credibility determinations. A defendant's demeanor on the witness stand may alone lead to the conclusion that his testimony is tailored.

Indeed, in this case the prosecutor properly relied on the defendant's demeanor and manner of testifying in support of her argument that his testimony was tailored. *See Reagan v. United States*, 157 U.S. at 305; *Johnson v. United States*, 157 U.S. at 326. She asked the jury to consider the "smooth slick character you saw here" and asked them if the manner in which defendant testified concerning how he fought off Ms. Winder "sound[ed] rehearsed" (JA: 45, 48). Under the standard pronounced by the Second Circuit, however, such demeanor evidence was virtually irrelevant, a conclusion that undermined the role of jurors as factfinders.

Even if more w[illegible]equired, the prosecutor provided it with specific references t[illegible]efendant's testimony. She pointed out that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denial of the crimes, and that "[e]verything else fits perfectly" (JA: 46-47). She also referred to how defendant's explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it "fits the whole scenario here" (JA: 37-39). And she directed the jury's attention to the fact that it was only on cross-examination that defendant remembered that Ms. Winder had slapped him during their first encounter (JA: 48). In light of these references, it is difficult to comprehend the Second Circuit's finding that the prosecutor solely relied on defendant's presence at trial to make her tailoring argument and that she failed to support her argument.

Thus, the Second Circuit's conclusion that a writ should be issued based upon the prosecutor's failure to establish a factual predicate for her summation comments was based on an erroneous legal rule and an inaccurate reading of the record.

CONCLUSION

Thus, *Griffin v. California* does not provide any basis for the conclusion that the defendant's constitutional rights were violated. Rather than standing for the broad proposition that a prosecutor may never comment on a defendant's exercise of his constitutional rights, *Griffin* merely represents one case in a spectrum of cases that mandates the implementation of a balancing test in determining the propriety of governmental practices, including prosecutorial comment, that may tend to discourage the exercise of a defendant's constitutional rights. Application of that test to the comments here compels the conclusion that they were proper. Defendant's exposure to the testimony of other witnesses and his use of that opportunity were central to his credibility. Thus, the comments materially advanced the truth-seeking function of the trial without impermissibly burdening defendant's right of confrontation, right to testify, and right to due process.

Respectfully submitted,

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JUNE 7, 1999

No. 98-1170

In The

Supreme Court of the United States

LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY,

Petitioner,

v.

RAY AGARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF RESPONDENT

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54 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that it is constitutional error to draw an adverse inference against a testifying defendant without any proof of tailoring, based solely on the exercise of his rights to be present and to confront his accusers.

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STATEMENT OF THE CASE

The Complainants' Allegations

Nessa Winder and *Breda Keegan*, old friends and roommates, first met respondent at a club on April 27, 1990. Winder agreed to go back to his apartment, and based on a talk they had on the subway ride home, after someone had "hassle[d]" them because Winder "was a white girl with a black man," respondent showed her a gun that he kept in his closet (W:34-40, 45-50, 167-70; K:232-37, 266-68, 275-76).[1] They engaged in consensual sex that night and again the next morning, and spent the day and another night together. They did not have further sex, because Winder's English boyfriend was coming to visit sometime the following week and she decided they "shouldn't go on like this" (W:41-44, 51-58, 170-77, 180). Respondent was "very understanding," and she testified that she had had a "great time" with him (58).

The following Saturday, Winder and Keegan met respondent at the same club. They later went to another bar with two of respondent's friends, and the five left for respondent's house between 4:00 and 4:30 a.m. (W:58-66, 180-82; K:238-45, 268-72). When they arrived, respondent's friends left to buy beer and the other three went upstairs. Winder fell asleep on respondent's bed, and Keegan claimed that respondent became verbally abusive and threatened her with violence, including pointing a gun at her (245-50). Keegan decided to leave, and accepted a ride home from one of respondent's friends

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[1] Numbers refer to the trial transcript; "S" to the sentencing minutes; "Pet.App." to the appendix to petitioner's certiorari petition; and "JA" to the parties' joint appendix in this Court.

when they returned. She testified that respondent again threatened her (250-52, 274-75), but this was denied by *Adolph Kiah*, who was called as a defense witness (524-25, 535). Keegan got home at around 6:00 a.m. and immediately went to bed without calling the police (252).

Winder awoke at 9:30 a.m. Respondent woke up also, and she told him she was in a rush to get home because she was expecting her English friend. He allegedly cursed her after she declined to have sex, and "busted" her lip (66, 73-77). During the next 3 1/2 hours, she said she was punched in the eye, threatened with a gun and sexually assaulted eight times (three acts of rape, three of oral sodomy and two of anal sodomy) (77-98). Twice she went to the bathroom by herself, and she admitted that she did not stay there behind the locked door or call out the window for help; nor did she ever attempt to run out the front door of the apartment, even when respondent left her to go to the bathroom and kitchen (81-83, 92-93, 95). Eventually, respondent called a cab for her (98-99), and he left a general apology on her answering machine the next day (108-09, 158-60).

Respondent's Testimony

Respondent, *Ray Agard*, essentially corroborated the complainants' accounts of the first weekend that he met them (*see* 649-59). The second weekend, Keegan was very loud when they got back to his house, and he went to sleep as soon as she left, about 6:00 a.m.(667-68, 698-704). He and Winder awoke about three hours later and had vaginal intercourse; they fell asleep again, reawaking between noon and 1:00 p.m. Winder was "kind of lazy" at

first, but when she noticed the clock she became "upset" and got up. She said "I got to get home. He's going to kill me," referring to her boyfriend, and she acted "hyper" (668-70, 710-11). Attempting to calm her down, respondent approached from behind and took hold of Winder's shoulders. She turned around and "smacked" him and then grabbed his lower lip, scratching him on the inside [Winder acknowledged scratching his lip: 88-89]. Reflexively, in response to the pain this caused, he used the palm of his hand to push her away, "hit[ting]" or "mush[ing]" her in the eye (670-72, 711, 716-19, 721-22, 725-26).

The next day, respondent called to apologize "because I felt that I should not have mushed her in the face" (673-74, 727). "I'm a guy. You feel kind of bad when you have an argument with a girl that you thought you liked, and it gets to the point where you have done something physical" (728). He was arrested the following day at the credit counseling company where he worked, and an unloaded gun, plus bullets stored with it, were recovered from his bedroom closet (Det. Giardina: 329-31, 333-41).

The Medical Evidence

Dr. *Ardeshir Karimi* saw Winder late on May 6, 1990. Her eye was black and blue, but there was no sign of injury to her lip (411-12, 429-30, 434). Winder testified that the two acts of anal intercourse she had allegedly been forced to engage in had hurt very much, at the time and later (94-96, 164-65, 222-24). However, Karimi's internal examination revealed no abnormalities of any kind –

e.g. redness, black and blue marks or other color change, or the presence of foreign particles – in either the anal (or vaginal) area (417, 428-29, 431-33). Also, Dr. *Robert Lewis*, a serology expert (444), determined that sperm was present only on the vaginal slides; all of the slides and swabs containing mouth and rectal material tested negative (453-56, 474-78).

Prosecutor's Remarks on Summation

The prosecutor noted that respondent was "the one who had an answer for everything" (JA 45), and "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly" (JA 46-47). She returned to this theme near the end of her summation (JA 49):

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> [objection overruled]
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> [objection overruled]
> He's a smart man. I never said he was stupid. . . . He used everything to his advantage.

The Charge, Deliberations and Verdict

Nineteen counts were submitted (*see* 847-97), two relating to Keegan – menacing and second degree possession of a weapon [possession with intent to use unlawfully, P.L. 265.03] – and fourteen associated with Winder: second degree possession of a weapon, nine sexual offenses [multiple counts of forcible rape, oral and anal sodomy and one count of sexual abuse, P.L. 130.35, 130.50, 130.65], unlawful imprisonment in the first and second degrees, intimidating a witness and felony assault [causing physical injury, no intent required, P.L. 120.05(6)]; respondent was also charged with two counts of "simple" possession of a weapon in the third degree [P.L. 265.02(1), misdemeanor level possession of an unloaded firearm coupled with prior conviction of crime; no 'intent to use unlawfully' element], and one lesser possession count in the alternative.

Deliberations lasted for four days, during which the jurors were sequestered (914-1054). They asked to hear the testimony of several witnesses, including respondent and Winder, and also requested re-instruction on the anal sodomy counts and the definition of "beyond a reasonable doubt" (915-22, 963, 1031). Respondent was ultimately acquitted of all charges relating to the complainants but two: one anal sodomy count and felony assault (1061-65); the assault conviction was later dismissed as repugnant to the rape acquittals (1073; *see* 1049, 1066). He was also convicted of both counts of third degree weapons possession.[2]

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[2] On respondent's state court appeal, the Appellate Division modified the judgment by dismissing one of the

SUMMARY OF ARGUMENT

The State seeks to impugn the credibility of *every* testifying defendant based solely on the defendant's exercise of his Sixth Amendment right to attend his trial, regardless of whether the State has adduced *any* evidence that he tailored his testimony. In numerous cases, this Court has condemned the needless burdening of constitutional rights, particularly where, as here, no overriding state interest is served: on the contrary, there is no legitimate basis to treat the Sixth Amendment as an unfair litigation advantage. The State is perfectly free to adduce evidence that the defendant tailored his account, and to engage in appropriate cross-examination. To go further, and comment on the defendant's right to be present as a means to cast wholesale suspicion on his account of the facts, is to provide an unfair litigation advantage to the prosecution. For the defendant's testimony may "fit" that of other witnesses for reasons other than hearing them in court – most notably, because he has not "tailored" at all, but rather is telling the truth; an inference of fabrication based on presence is accordingly speculative at best and may often be completely unfounded. Moreover, the risk of tailoring based on courtroom presence is minimal for defendants due to, *e.g.*, generous pre-trial discovery policies in modern times; defendants know a great deal about the case before they ever enter the courtroom, and are

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weapons' possession counts (Pet. App. 7). Respondent has fully served his sentence on the remaining weapons count and did not raise any issues with respect to this conviction in his habeas petition.

thus far less prone to being influenced by the testimony of others.

The conversion of a constitutional prerogative into an impeachment device also undermines the presumption of innocence. All defendants have confrontation rights, and the credibility of the innocent and guilty alike is undermined by spotlighting the "benefit" this provides. Indeed, the more coherent and consistent and fleshed out a defendant's testimony is – factors typically pointing to veracity – the more "tailored" *i.e.* unworthy of belief it will appear. The defense would also be saddled with a burden to rebut a charge of tailoring, which, despite petitioner's facile reference to the defendant's purported ability to reopen the case, would be virtually impossible to meet. If the defendant tried to do so, moreover, his Fifth Amendment privilege would be compromised: in anticipation of a recent fabrication charge based on hearing other witnesses in court, he would need to find a prospective rebuttal witness to whom to make a detailed statement of the facts before the trial started.

Even if comments on the defendant's unique *opportunity* to tailor are constitutionally permissible, the prosecutor in this case went further: she lodged an affirmative accusation of tailoring without any evidentiary support whatsoever. Thus, simply by virtue of his exercise of his right to be present, respondent was tagged a liar and, concomitantly, the credibility of the State's witnesses was bolstered. This was unquestionably a penalty imposed on the exercise of his Sixth Amendment rights. The court below found that the prosecutor's comments violated respondent's right to due process as well; it was fundamentally unfair to raise a tailoring claim for the first time

on summation, with no record support and no meaningful opportunity for the defendant to respond. Although petitioner argues that respondent's Fourteenth Amendment rights to due process and a fair trial were not violated, this issue was neither presented in its Question Presented nor is it fairly included therein. Accordingly, the claim should not be considered by this Court.

The finding of a due process violation was, in any event, amply justified. Because the State has not contested the additional finding that the constitutional error (whether based on the Fifth, Sixth or Fourteenth Amendments) was sufficiently harmful to warrant granting the writ, the judgment below should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT IT IS CONSTITUTIONAL ERROR TO DRAW AN ADVERSE INFERENCE AGAINST A TESTIFYING DEFENDANT WITHOUT ANY PROOF OF TAILORING, BASED SOLELY ON THE EXERCISE OF HIS RIGHTS TO BE PRESENT AND TO CONFRONT HIS ACCUSERS.

I. Comments which invite the jury to draw an adverse inference against the defendant solely due to his exercise of his Sixth Amendment rights should be prohibited.

The State seeks permission to impugn the veracity of *every* defendant who takes the stand with the fact that he exercised his Sixth Amendment right to attend his trial. Petitioner maintains that a testifying defendant should not be treated any differently than ordinary witnesses,

yet propounds a rule which makes just such a distinction: defendants, unlike other witnesses, have confrontation rights, and defendants alone would be subject to a sweeping charge of tailoring grounded on that circumstance. Moreover, the charge need not be supported by any proof, according to petitioner – under the guise of leveling the playing field, the State contends that it should be entitled to impugn the credibility of all defendants, innocent and guilty alike, based on nothing more than rank speculation that they *might* have tailored their testimony after hearing other witnesses. As the court below correctly held, the rule petitioner advocates violates the defendant's Fifth and Sixth Amendment rights.

A. The court of appeals properly determined that respondent's Sixth Amendment rights were violated by the prosecutor's comments on summation, which significantly burdened his right to be present without advancing any legitimate state interest.

A practice by which the State needlessly penalizes the defendant for exercising his constitutional rights is itself unconstitutional. This broad principle was clearly stated in *Griffin v. California*, 380 U.S. 609 (1965), a case relied on by the court of appeals to support its finding of constitutional error in this case. *See also Grunewald v. United States*, 353 U.S. 391, 425-26 (1957) (concurring opinion of four Justices) (hard to conceive of circumstances "that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them").

Griffin's penalty analysis has been applied in subsequent cases as well, and has not been limited to practices which implicate only Fifth Amendment rights. For example, the same reasoning was used in *United States v. Jackson*, 390 U.S. 570 (1968), to strike down a death penalty provision. Under the statute, only a defendant who asserted his Sixth Amendment right to a jury trial risked a sentence of death; "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed," because only a jury could impose that ultimate penalty (*id.* at 581). This Court noted that "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional" (*id.*). *See also, e.g., Mitchell v. United States*, 119 S.Ct. 1307, 1316 (1999) (trial court "imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination" by holding defendant's silence against her at sentencing); *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972) (law which "exacts a price for [defendant's] silence by keeping him off the stand entirely unless he chooses to testify first" ruled unconstitutional; it "casts a heavy burden on a defendant's otherwise unconditional right not to take the stand," thereby improperly "cut[ting] down on the privilege . . . by making its assertion costly"); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (citing *Jackson*, striking down law which "unreasonably burden[ed]" constitutional right to travel); *Harman v. Forsseni*, 380 U.S. 528, 540 (1965) (ruling unconstitutional a provision which abridged right to vote; "It has long been established that

a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution"); *cf. Zant v. Stephens*, 462 U.S. 862, 885 (1982) (invalid to "authorize[ ] a jury to draw adverse inferences from conduct that is constitutionally protected").

Even if the particular governmental practice at issue has a perfectly legitimate objective, it would still be unconstitutional if it "needlessly chill[s] the exercise of basic constitutional rights" (*Jackson, supra*, 390 U.S. at 582). Therefore, in determining whether constitutional error has occurred, it is necessary to consider not only whether the State's objective is reasonable in itself, but also whether that objective can be achieved by means which do not exact a price for the defendant's assertion of his rights (*id.* at 582-83). As petitioner has acknowledged, the burdening of constitutional rights is "permissible" only "when the benefit to be achieved is of sufficient magnitude and the impairment of the right is not appreciable" (Pet.Br., p.17; *see id.*, pp.19, 24-27).

In this case, two fundamental constitutional rights were targeted by the prosecutor: respondent's twin exercise of his Sixth Amendment rights to be present at trial and confront his accusers and his Fifth and Sixth Amendment right to testify on his own behalf, all rights secured in state proceedings by the Fourteenth Amendment. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). With credibility the only issue for the jury to decide, the prosecutor used these rights to convert the plausibility of respondent's account – he was "the one who had an answer for everything," "[a] lot of what he told you corroborates what the complaining witness told

you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly" – into a liability; endorsed by the trial court, which overruled defense counsel's objections, the prosecutor urged the jury to dismiss respondent's testimony as a fabrication based solely on the "benefit" and "advantage" he alone had: "he gets to sit here and listen" and "think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?"

Unquestionably, respondent's confrontation rights were asserted at great cost to the defense. The only way to avoid this generic form of "impeachment," moreover, is to chose between the important right to be present or the equally important right to testify. Clearly, to sustain such a forced election of rights, or, alternatively, to justify the automatic impugning of a defendant's credibility if such an election is not made, the State must proffer a substantial overriding interest. It purports to do so, arguing that the prosecutor's comments were a legitimate form of "impeachment" which fosters the search for truth. This is so, petitioner claims, because in *every* case where an unsequestered defendant takes the stand – whether or not there is evidence that he has actually used the "benefit" he has to his "advantage" – the inference of tailoring is so logical, and the prospect of tailoring so likely, that the defendant's exercise of his Fifth and Sixth Amendment rights must be flagged to the jury as a license to commit perjury. Petitioner's premise is flawed, however, and its interest in promoting reliable verdicts cannot justify the kind of burdening of defendant's rights at issue here.

First, there are a number of explanations for why the defendant is able to "answer" all pertinent questions put to him, or why his account "fits" the State's evidence "perfectly" except for his "denials of the crimes": most notably, the defendant is telling the truth. *See Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (impeachment of defendant's credibility with proof of his post-arrest silence prohibited in part because such silence is "ambiguous," and a negative inference is therefore not necessarily warranted). If the jury can be asked to consider the defendant's opportunity to adjust his account based on the assertion of his confrontation rights, without any proof that he actually used the opportunity to his advantage, the presumption of innocence is effectively undermined – resting on no firmer ground than rank speculation, the defendant's testimony is singled out for special scrutiny and his credibility blanketly assailed. The defendant's status, in turn, is used against him, and the innocent defendant who has not tailored his testimony is tarred to the same degree as the guilty defendant who has. This is hardly a "litigation boon" to the defense (Pet.Br., p.34). *See James v. Illinois*, 493 U.S. 307, 314 (1990) (approving impeachment rules which "discourage[ ] perjured testimony *without discouraging truthful testimony*" [emphasis added]).[3]

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[3] This was not the case in *Perry v. Leeke*, 488 U.S. 272 (1989), where this Court found no error in precluding the defendant from conferring with his lawyer during a brief, 15-minute recess between direct and cross-examination: the Court expressly noted that cross-examination of an uncounselled witness "is more likely to lead to the discovery of truth" (488 U.S. at 282). In addition, although there is no constitutional right to consult

Second, the State has legitimate, time-honored methods for establishing a tailoring claim, if such a claim is valid, without punishing the defendant for exercising his constitutional prerogatives: the introduction of impeachment evidence such as prior inconsistent statements, appropriate cross-examination and fair comment on the evidence during summation. Thus, if proof that the defendant tailored his testimony is available or can properly be developed, the prosecutor is certainly free to adduce such evidence and to use it, in support of an argument that the defendant fabricated his version of events and should not be believed or for any other relevant purpose. Significantly, virtually all of the cases petitioner cites address standard forms of impeachment *evidence*. *See* cases cited in Pet.Br., p.20 incl. n.5, such as *Jenkins v. Anderson*, 447 U.S. 231, 235-38 (1980) (approving impeachment of defendant's credibility with proof of pre-arrest silence); *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (same re: prior inconsistent statements made to police in violation of *Miranda* rights); *Brown v. United States*, 356 U.S. 148, 154-56 (1957) ("If [the defendant] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination").

Third, whether or not evidence of tailoring is adduced, there is no justification for deriding the defendant's Sixth Amendment rights as an unfair litigation

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with counsel while testifying (*id.* at 281), a defendant *does* have a constitutional right to be present at trial.

advantage: at most, the defendant's opportunity to hear other witnesses *might* serve to explain how he happened to modify or shape his testimony; it is not evidence of tailoring in its own right. *Cf. Grunewald v. United States, supra*, 353 U.S. at 420 ("[the defendant] was subject to cross-examination impeaching his credibility just like any other witness," but "[t]his does not . . . resolve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of [defendant's] credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury"). And, where the prosecutor has an evidentiary basis to argue that the defendant altered his story (an entirely appropriate attack on his credibility), it does not legitimately advance the State's cause to note that the defendant had received "a big benefit and advantage that other witnesses did not have, he got to sit here and listen to all the proof before he took the stand." *Cf. Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) ("the State's legitimate interest in proving [defendant's sanity] could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel"). The latter comments have no probative content whatsoever, and are instead an impermissible burdening of the defendant's constitutional rights to be present at trial and to confront his accusers face-to-face. *See, e.g., United States v. Jackson, supra*, 390 U.S. 570.

Absent evidence of tailoring, the endorsement of petitioner's position would permit impeachment by speculation and innuendo – hardly conducive to the search

for truth. On the contrary, armed with nothing more than defendant's presence at trial, the prosecutor could highlight factors which typically point to the speaker's honesty – no inconsistencies, no gaps, few deviations from the accounts of opposing witnesses except on material points – and convert them instead into reasons to doubt the defendant's veracity. Such an argument also permits the State to undermine the defendant's credibility wholesale, as to all the particulars of his account, and concomitantly bolster the credibility of the State's witnesses. As a result, the defendant is severely punished for exercising his Sixth Amendment rights, and thus "do[ing] what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

Finally, the risk of tailoring based on presence while others testify is generally far lower for defendant witnesses than other witnesses, and is virtually non-existent with respect to material facts. In modern times, a criminal defendant is afforded broad discovery rights and corresponding access to a wealth of pre-trial discovery (police reports with witness statements, medical reports, grand jury minutes, etc.). In addition, and also in contrast to other witnesses, the defendant has a right to counsel. From the moment he is charged, throughout the typically considerable period before the trial is held, the defendant has an advocate whose job it is to investigate the facts, to uncover weaknesses in the State's case, and to consider as well the points on which the defendant is most vulnerable. Therefore (although unbeknownst to the jury), he has a very good idea of what the prosecution witnesses will say before they appear at trial, and has ample time to fashion the best "story" possible if he is determined to lie

on the stand. Significantly, *all* witnesses have the *opportunity* to fabricate, in myriad ways, and cross-examination, the " 'greatest legal engine ever invented for the discovery of truth' " (*California v. Green*, 399 U.S. 149, 158 [1970]), provides very effective tools for exposing perjury.

An ordinary witness, in contrast, will be far less prepared and knowledgeable about the case overall, and concomitantly far more susceptible to influence by other witnesses. Even with respect to non-defendant witnesses, moreover, the importance of the sequestration rule is hardly as "profound" as petitioner maintains (Pet.Br., p.28). Professor Wigmore himself acknowledged that the rule was inspired not by the routine practice of tailoring, but rather by the "*occasional* readiness of the interested person to adapt his testimony" (*Brooks v. Tennessee*, *supra*, 406 U.S. at 607, quoting Wigmore [emphasis added]). In New York, the exclusion of witnesses is not even a matter of right, but one addressed to the trial court's discretion (*see People v. Medure*, 178 Misc. 2d 878, 880 [Sup.Ct., Bronx Co., 1998] and cases cited therein), and the federal rule authorizes an exemption for one "whose presence is shown by a party to be essential to the presentation of his cause" (Fed.R.Evid. 615).

Respondent does not contend that sequestration has no validity in curbing the tailoring of testimony. However, it is clearly far more effective when applied to non-party witnesses than to the defendant. Further, there is no countervailing policy at stake with the ordinary witness, whereas the defendant has a concomitant constitutional right to both face his accusers and to testify on his own behalf. To eliminate even the barest possibility of tailoring, sequestration is accordingly a reasonable precaution

for all witnesses save the defendant. In his case, of course, forced sequestration is forbidden by the Sixth Amendment; and, in keeping with the dictates of *Griffin*, *Jackson* and other decisions previously discussed, it is clearly unwarranted to permit adverse comment on a defendant's rights simply to reduce not the *fact* of tailoring – such proof, if any, can be developed independently – but the mere *possibility* of it.

Significantly, this Court has twice been asked to weigh the policy considerations favoring sequestration of witnesses generally against specific constitutional rights of the accused, and it has twice resolved the question in the defendant's favor. In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court struck down a state law which required the defendant to testify as the first witness for the defense if he testified at all. The statute was

> related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case . . . Because the criminal defendant is entitled to be present during trial, and thus cannot be sequestered, the requirement that he precede other defense witnesses was developed by court decision and statute as an alternative means of minimizing this influence on him.

Id. at 607. The Tennessee law reflected "an apparent attempt at symmetry," for the State's chief prosecuting witness was also required to testify first if he wanted to remain in the courtroom for the balance of the trial (*id.* at 611, n.5). There was "a fundamental distinction" between the two sides, however: "the State, through its prosecuting witness, does not share the defendant's constitutional

right not to take the stand. Thus, the choice to present the prosecuting witness first or not at all does not raise a constitutional claim secured to the State, as it does in the situation of the defendant" (*id.*). That the statute reflected a legitimate "interest in preventing testimonial influence" was acknowledged, but "[p]ressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty" (*id.* at 611). Here, too, pressuring a defendant to waive his right to be present during the government's presentation of proof, in order to preclude the prosecutor from impugning his credibility on tailoring grounds if he elects to testify, should be forbidden.

Similarly, in *Geders v. United States*, 425 U.S. 80 (1975), the rationale of sequestration was deemed insufficient to interfere with the defendant's Sixth Amendment right to counsel. An overnight recess had been declared during the defendant's testimony, and the trial court's order that he not consult with counsel during that period was held unconstitutional. Once again, the benefits of sequestration generally were acknowledged, as were the trial judge's efforts at evenhandedness: before each recess, *all* witnesses whose testimony had not been completed were admonished not to discuss their testimony with anyone (*id.* at 87-88). Nevertheless, there "are other ways to deal with the problem of possible improper influence or 'coaching' of a witness" besides interfering with the right to counsel. For example,

> [a] prosecutor may *cross-examine* a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. *Skillful cross-examination could develop a record*

> *which the prosecutor in closing argument might well exploit* by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

id. at 89-90 (emphasis added). But "[t]o the extent that conflict remains between the defendant's right to consult with his attorney" and the State's desire to minimize "the risk of improper 'coaching,' the conflict, must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel" (*id.* at 91).

Here, as well, the State has powerful tools with which to expose tailoring: prior inconsistent statements and cross-examination. *All* witnesses, including the defendant, are subject to impeachment with actual proof of tailoring. But the defendant should never be subjected to unsupported accusations of fabrication – much less those linked directly to the exercise of his constitutional prerogatives. Such accusations compromise basic, fundamental rights that ordinary witnesses do not have, as well as the important policies underlying those rights, *e.g.*, the presumption of innocence, the right to a fair trial and to present a defense and, of course, the right of confrontation.[4]

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[4] That the defendant is not an ordinary witness and may not always be treated as such is hardly a novel proposition. For example, he is the only witness who cannot be impeached without limitation concerning his pre-trial silence. *Compare Fletcher v. Weir*, 455 U.S. 603 (1982), and *Jenkins v. Anderson*, 447 U.S. 231 (1980), *with Doyle v. Ohio*, 426 U.S. 610 (1976); under New York law, the distinction drawn between criminal defendants and other witnesses in this area is even starker. *See People v. Conyers*, 52 N.Y.2d 454, 458-59 incl. n.2 (1981); *People v. Dawson*, 50 N.Y.2d 311, 321 (1980). In New York, the defendant is also entitled to circumscribe the admissibility of prior crimes evidence should he elect to take the stand; the entire criminal history of a non-party witness, in contrast, may be spread before the jury. *People v. Ocasio*, 47 N.Y.2d 55 (1979); *People v. Sandoval*, 34 N.Y.2d 371 (1974); *see People v. Allen*, 69 A.D.2d 558, 560 (2nd Dept. 1979), *aff'd* 50 N.Y.2d 898 (1980) (discussing policy reasons for treating the two categories of witnesses differently). Similar distinctions are drawn in federal court as well. *See* Fed.R.Evid. 609. Most pertinent to this case, the defendant is the only witness who has a constitutional right to be present and confront the other witnesses who appear, a distinction with recognized constitutional implications. *See Brooks v. Tennessee*, 406 U.S. at 611 incl. n.5; *see also Geders v. United States*, 425 U.S. at 91.

In sum, comments which seek to penalize a defendant for exercising his constitutional rights are forbidden, at the least where, as in the context under review here, the State has no legitimate overriding interest to counterbalance the chilling effect that the threat of such comments will have. Direct references to the defendant's singular right to be present should accordingly be prohibited as violative of the Sixth Amendment.

B. The violation of respondent's Sixth Amendment rights was particularly egregious because the prosecutor did not merely note respondent's opportunity to tailor but affirmatively accused him of doing so, with no supporting evidence and based solely upon the assertion of his right to be present.

Assuming, *arguendo*, that there could ever be circumstances in which it would be legitimate to link the defendant's exercise of his right to be present with a tailored testimony charge, this Court should still affirm the judgment of the court of appeals. For the prosecutor in this case did not simply note on summation that respondent had the chance to adjust his testimony to fit the State's case; instead, she argued that he had actually taken advantage of the opportunity and lied. Petitioner concedes that this accusation was made. Pet.Br. at, *e.g.*, p.17 ("the prosecutor's comments here [were] that defendant had *and used to his benefit* his unique opportunity to hear the other witnesses"); p.39 ("The prosecutor merely argued that the defendant *wrongfully conformed his testimony* around that of the prosecution witnesses"); p.46 ("the prosecutor . . . argu[ed] that *his testimony was tailored*"). Moreover, although the charge of tailoring certainly suggested to the jury that supporting evidence existed, none had been proffered, and the argument was entirely speculative.[5]

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[5] In its brief (p.46), petitioner cites a few items of "evidence" that purportedly supported the trial prosecutor's tailoring argument, but none is even remotely legitimate: (1) the prosecutor's own characterization of respondent as a "smooth slick character" – an entirely subjective description, again with no supporting evidence, and hardly "proof" in its own right; (2) her rhetorical query as to whether a short section of respondent's testimony "sounded rehearsed" – *not* because he had heard other witnesses, but because "[h]e said it twice. He said it on direct examination and he said it on cross" (*see* JA 48); (3) her contention "that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denials of the crimes, and that '[e]verything else fits perfectly' " – if true (this charge covered the entire testimony of multiple witnesses in a single sentence), the same could be said if respondent had been telling the truth; (4) her claim that "*defendant's* explanation" concerning a certain point "fits the whole scenario here" – this is actually a reference to an argument made by *defense counsel* on summation, not to respondent's testimony (*see* JA 37); and, finally, (5) "[the trial prosecutor] directed the jury's attention to the fact that it was only on cross-examination that defendant remembered that Ms. Winder had slapped him during their first encounter" – it is hard to see how changing one's own account between direct and cross examination (here, merely adding a detail) supports a charge of "tailored to fit the State's case"; more significantly, *Winder never mentioned this slapping incident herself* (nor did anyone else), so a "tailoring" accusation is completely unjustified (for the record, the trial prosecutor mischaracterized respondent's testimony when she claimed he said he had been slapped three times before Winder scratched him [JA 48; defense counsel's objection overruled] – he consistently said she slapped him only once before scratching his lip [*see* 670-72, 711, 719, 726]).

If a line between permissible and impermissible comment on presence is to be drawn, then, it was clearly crossed in this case. The requirement that a verdict be grounded solely on lawful, probative evidence is hardly a remarkable proposition (*see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 485 [1978]), and neither is the corollary: in closing argument, the prosecutor may not refer to matters not in evidence, intimate the existence of additional proof

of which he is personally aware, or ask the jurors to draw conclusions which are not fairly inferable from the proof (*see, e.g., Berger v. United States*, 295 U.S. 78, 84, 88 [1935]). And, as the court below noted (Pet.App. 51a), citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986), this Court has advocated particular vigilance in safeguarding the exercise of specific constitutional rights against prosecutorial abuse. *See also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The prosecutor's argument also effectively turned the presumption of innocence on its head: the jury was asked to presume instead that all defendants who exercise their rights to confrontation and to testify have tailored their accounts, and are therefore less worthy of belief than the State's witnesses. As a witness, however, a defendant is neither believable nor unbelievable *per se*. *Allison v. United States*, 160 U.S. 203, 210 (1895); *Reagan v. United States*, 157 U.S. 301, 310 (1895). In this case, moreover, the prosecutor did not merely invoke a presumption of fabrication, she made an actual charge of tailoring linked directly and solely to respondent's right to be present.

Clearly, respondent's Sixth Amendment rights were affirmatively used against him, both to undermine his credibility and, in juxtaposition, to bolster the complainants' accounts; indeed, the very plausibility of his account became a reason to doubt his veracity. That this was a penalty under the *Griffin-Jackson-Brooks* line of cases discussed *ante* cannot be seriously questioned, nor can the State possibly legitimize the practice. Significantly, apart from claiming that the tailoring accusation *did* have evidentiary support (*but see* n.5, *ante*), the State makes no effort to do so. The result, in turn, was to

undermine the search for truth, not foster it, because the credibility issue was improperly weighted in the State's favor.

C. This Court's decision in *Griffin v. California* mandates affirmance of the judgment below.

Although the court of appeals only analogized this case to *Griffin v. California, supra*, 380 U.S. 609 (Pet.App. 42a), finding the constitutional issue here "somewhat similar" (Pet.App. 73a), *Griffin* provides an independent basis for this Court's affirmance of the judgment. In *Griffin*, comments on the defendant's silence at trial, inviting the jury to use the defendant's invocation of his Fifth Amendment privilege against him, were held to be constitutional error. Although the defendant's right to remain silent had been literally respected – he was not compelled to testify – a penalty was nevertheless exacted. The comments thus "cut[ ] down on the privilege by making its assertion costly" (380 U.S. at 614). In this case, likewise, the prosecutor commented on the defendant's presence at trial, and invited the jury to use the invocation of his confrontation rights against him. He exercised his right to be present, just as the defendant in *Griffin* exercised his right to remain silent, but a penalty was just as clearly imposed.

Just months ago, in *Mitchell v. United States, supra*, 119 S.Ct. 1307, the tenets of *Griffin* were upheld by this Court. Because the penalty analysis in this case is logically indistinguishable from that in *Griffin* and *Mitchell*, a finding of constitutional error must follow. That the jurors might notice defendant's unique opportunity to

listen to the other witnesses before he takes the stand, and draw an adverse inference of tailoring on their own, cannot excuse or soften the error of having the inference expressly drawn for them by the State's representative. *See Griffin v. California*, 380 U.S. at 614. And, to the extent that the fact-finders would be more likely to hold the accused's exercise of his right to remain silent against him than his exercise of his right to be present, a negative reference to the latter is even more prejudicial than the comments ruled unconstitutional in *Griffin*: what might otherwise be an unremarkable fact – the defendant is there, listening to the evidence – is affirmatively flagged to the jury and converted into a liability for the defense.

Moreover, that the defendant's silence was used as substantive evidence of guilt in *Griffin* and his presence as impeachment evidence in this case is a distinction without a difference. Indeed, in *Doyle v. Ohio, supra*, 426 U.S. 610, this Court found the prosecutor's use of defendant's post-arrest silence – not as substantive evidence of guilt but solely to impeach his credibility – to be constitutional error. In both *Griffin* and here, the prosecutor sought to raise an unfavorable inference from the exercise of the defendant's constitutional rights, and in each case thereby imposed a penalty for his assertion of those rights. Rather than turning a silent defendant into a source of evidence against himself, as in *Griffin*, comments on the defendant's exercise of his right to be present effectively convert a *testifying* defendant into a source of incriminating proof: only a guilty defendant fabricates his account of events, and only a guilty defendant would need the crutch of hearing all of the witnesses against him before taking the stand himself.

D. This Court's decision in *Reagan v. United States* does not support petitioner's contention that it can impugn the credibility of all defendants based solely on the exercise of their Sixth Amendment rights.

Petitioner has pointed to the propriety of the interested witness charge in support of its argument; citing this Court's decision in *Reagan v. United States*, 157 U.S. 301 (1895), it notes that the defendant's status necessarily gives him an interest in the outcome of the case which can properly be flagged to the jury as relevant to his credibility (*see* Pet.Br., p.21). The analogy, however, does not hold up. The remarks at issue here highlight the unique "benefit" the defendant has which purportedly reflects negatively on his credibility; he alone has the privilege of listening to others testify, and that privilege renders his own testimony suspect. The 'impeachment' argument applies only to defendants, and it directly implicates rights afforded by the Fifth and Sixth Amendments. In contrast, comments on a defendant's interest, and attendant motive to lie, do not concomitantly convert the defendant's exercise of a constitutional right into an unfair litigation advantage: no adverse inference is drawn from the fact that the defendant chose to take the stand. On the contrary, *all* trial witnesses, by definition, testify, and the interest of *any* witness is an appropriate subject for comment.

Moreover, the modern trend is to avoid instructions in which the defendant's testimony is singled out for special scrutiny. *See, e.g., United States v. Rollins*, 784 F.2d 35, 37-39 (1st Cir. 1986); authorities cited in brief of United States as amicus curiae, p.15, n.5. This is certainly

true in New York, where the jury is routinely instructed that they may consider the interest of any witness, including the defendant, but that there is no presumption that an interested witness lies or that a disinterested witness tells the truth. *People v. Agosto*, 73 N.Y.2d 963, 967 (1989); *People v. Whitmore*, 123 A.D.2d 336 (2nd Dept. 1986); *see People v. Gadsen*, 80 A.D.2d 508 (1st Dept. 1981).[6]

Significantly, the *Reagan* decision also noted "[t]he fact that [the witness] is a defendant does not condemn him as unworthy of belief" (157 U.S. at 305); the jury may not be told "directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness" (*id.* at 310); *accord Allison v. United States*, 160 U.S. 203, 210 (1895) ("As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness"); *Hicks v. United States*, 150 U.S. 442, 452 (1893)

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[6] At the time the *Reagan* decision was published, it had been less than fifteen years since the *per se* disqualification of defendants as witnesses was abolished by federal statute (157 U.S. at 304-05). At common law, anyone with the least interest in the proceeding, necessarily including all criminal defendants, was deemed incompetent to testify, and this antipathy lasted in this country through the end of the nineteenth century; as late as 1961, in fact, Georgia still forbade a defendant from being a witness in his own behalf. *Ferguson v. Georgia*, 365 U.S. 570, 573-77 (1961). For what it is worth, it seems unlikely that an interested witness charge such as that delivered in *Reagan* (reproduced in the syllabus) would be wholeheartedly endorsed today.

("men may testify truthfully, although their lives hang in the balance"). The comments at issue in this case, in contrast, *do* condemn defendants as a group as unworthy of belief.

Thus, when a defendant's unique "opportunity to tailor" is spotlighted, and his veracity thereby automatically impugned, error similar to that foreclosed by *Reagan*, *Allison* and *Hicks* is committed. The jury is, in effect, invited to presume fabrication on the defendant's part in every case – there is no other reason to discuss the point. Although every defendant who testifies is an interested witness, not every interested witness tailors his testimony, and the jury certainly should not be urged to assume that he did.

II. The court of appeals correctly held that respondent's Fifth Amendment rights were also violated by the prosecutor's comments.

The contention that defendants can uniformly be accused of tailoring their testimony, simply by virtue of their presence at trial, implicates Fifth Amendment rights in several respects. First, a defendant will be pressured to abandon his right to testify, "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony" (*Rock v. Arkansas, supra*, 483 U.S. at 52), in order to foreclose the prosecutor from assailing his veracity. This pressure will be particularly acute if an affirmative accusation of tailoring is lodged as it was in this case. If the defendant can be tagged a liar simply because he was present during presentation of the evidence, testimony which he would otherwise expect to exonerate him would

instead become evidence of guilt – only a guilty person would fabricate facts, and only guilty defendants lie about what transpired.

Second, an unsupported tailoring argument shifts the burden of proof to the defense to rebut the accusation. Petitioner disingenuously contends that this is easily accomplished, for a truthful defendant is allegedly free to counter the adverse inference of fabrication by moving to reopen the proof (Pet.Br., p.36). If the State is permitted to make a blanket charge of tailoring, however, as it did here, the defendant is at a serious disadvantage in attempting to dispel the aura of suspicion which has been cast upon him: he does not know what to rebut, specifically, because the tailoring charge is devoid of any detail. If he decided to be a rebuttal witness himself, then, the defendant could do no more than seek to get back on the stand (which would be at the court's discretion under New York law, *People v. Washington*, 71 N.Y.2d 916, 918 [1988]) and baldly state that he had not tailored his testimony as a result of hearing the other witnesses. Proving a negative ("I never beat my wife") is virtually impossible, and such "rebuttal evidence" would hardly be convincing to the jury.

Thus, the only way for a defendant to successfully combat a baseless tailoring argument would be to waive his right to remain silent before trial commences; he would then have a rebuttal witness in reserve who would be able to recount his pre-trial statements and demonstrate that his trial testimony was *not* "adjusted" to fit other witnesses' accounts. In *Brooks v. Tennessee, supra*, 406 U.S. 605, this Court held it unconstitutional to require the defendant to testify immediately after the prosecution

rested, prior to calling any other defense witnesses. Necessarily, then, it is unconstitutional to require him to make a statement before the trial starts, solely to able to counter an unsupported claim of tailoring based on the exercise of his Sixth Amendment rights.

As a practical matter, moreover, the possibility that other witnesses could salvage the defendant's credibility would necessarily be low. The most likely person with whom the defendant would have discussed the facts of the case before trial, who might thereby be in a position to recount defendant's prior consistent statements to the jury, would be defense counsel. A defendant should not be compelled to discuss the facts of the case with his attorney any more than with anyone else, of course, and certainly not in anticipation of a gratuitous attack on his credibility at trial. Further, in order to use counsel to meet the charge of fabrication, the defendant would be forced to waive his attorney-client privilege. There would also be a serious risk that counsel would then be disqualified from further participation in the case under the Code of Professional Responsibility and New York's advocate-witness rule (*see People v. Paperno*, 54 N.Y.2d 294, 299-300 [1981]). Since any competent defense attorney would advise his client not to discuss the charges with anyone, it is doubtful that other rebuttal witnesses would exist. But if they did, the defense would have to request a continuance in order to seek them out, which would disrupt the progress of the trial indefinitely after the evidence had already been closed.

Finally, even if such witnesses could be found and timely produced, it is not at all clear that they would be permitted to rehabilitate the defendant's credibility. For

prior consistent statements are hearsay, and are only admissible to rebut a charge of recent fabrication. The proponent of such evidence must therefore demonstrate that the prior statements were made at a time when the speaker had no motive to lie, and in the context under discussion here, a guilty defendant would have the same motive to fabricate upon commission of the crime as he would at trial. *People v. McClean*, 69 N.Y.2d 426, 427-28 (1987); *People v. Davis*, 44 N.Y.2d 269, 277-78 (1978); *see also Tome v. United States*, 513 U.S. 150 (1995) and Fed.R.Evid. 801(d)(1). Thus, the only person who could counter a sweeping, wholly unsupported claim of tailoring would be one to whom the defendant had made as full and detailed an account of events as he later gave at trial – a very tall order to fill.

Petitioner's claim that the defendant could put on a rebuttal case is thus glibly stated but unconvincing. In many cases the defendant would have nothing with which to counter a "he was able to tailor because he heard our witnesses" argument; if he did, his Fifth Amendment privilege would necessarily be abrogated. To put his back to the wall in this way is constitutionally untenable, for no legitimate purpose can be served by the sort of "impeachment" argument that was made at respondent's trial.

On the contrary, there is a far higher risk of impeding the search for truth than promoting it if such an argument is condoned. The honest defendant, testifying truthfully from recollection, will be unfairly impugned – the more coherent and complete his account, the stronger the accusation of fabrication will appear – and he will have equally unacceptable options for foreclosing such an

attack: (1) he can refrain from testifying altogether, thereby denying the fact-finder valuable evidence; (2) he can waive his confrontation rights with all their associated fair trial benefits (*see, e.g., Coy v. Iowa*, 487 U.S. 1012 [1988]; *Snyder v. Massachusetts*, 291 U.S. 97 [1934]), and undermine as well his rights to counsel and to present a defense; or (3) he can, as a preemptive move, waive his right to remain silent and make a detailed post-arrest statement to the police or other witnesses, which can later be compared to his trial testimony if a tailoring claim is made; alternatively, he can give up his Fifth Amendment right to preclude the admission of his post-arrest silence into evidence (*Doyle v. Ohio*, 426 U.S. 610 [1976]) – if the defendant does not have such a pre-trial statement with which to counter a tailoring charge, his silence will be implicitly used against him.

The defendant should not have to make such choices merely to afford the State the opportunity to make unfounded attacks on his credibility. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (statute impermissibly "requires appellee to forfeit one constitutionally protected right as the price for exercising another"). At the very least, a tailoring charge made for the first time on summation, as it was in this case, must be deemed unconstitutional, for it is virtually impossible for the defendant to rebut such a charge.

III. The court of appeals' conclusion that the prosecutor's tailoring argument also violated respondent's Fourteenth Amendment rights to due process and a fair trial is not properly before this Court and is, in any event, correct.

A. Because petitioner did not seek review of the court of appeals' holding that the prosecutor's summation comments violated due process, that holding is an independent basis for the judgment below, which should be affirmed.

Petitioner contends that the court of appeals erred by finding a due process violation in this case (*see* Pet.Br., pp.39-44). This issue, however, was not set forth in petitioner's Question Presented:

> Whether the Second Circuit Court of Appeals erred in extending this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965) – which prohibited a prosecutor's comment on a defendant's right to remain silent – to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses?

Nor is the due process issue fairly included within the question. Indeed, the Solicitor General has candidly admitted that the *only* issue presented in the certiorari petition is whether *Griffin* was erroneously extended (amicus brief, p.25, n.14), and the Fourteenth Amendment is not even cited in petitioner's brief as "involved" in the issue presented to this Court (*see* Pet.Br., p.2).

Therefore, petitioner's due process argument should not be considered by this Court. U.S.Sup.Ct. Rule 14.1(a); *Jones v. United States*, 67 U.S.L.W. 4508, 1999 U.S.Lexis

4201, p.35 (1999); *Taylor v. Freeland*, 503 U.S. 638, 645 (1992); *Yee v. Escondido*, 503 U.S. 519, 535-38 (1992). Clearly, whether the particular comments made at respondent's trial warrant granting of the writ on due process grounds is an entirely different question than that presented by petitioner. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993), quoting *Yee v. Escondido, supra*, 503 U.S. at 537 ("a question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein' ").

Moreover, contrary to petitioner's claim that the court of appeals rested its finding of a due process violation solely on the court's "assum[ption of] the existence of a *Griffin*-like error," with no other analysis (Pet.Br., pp.39-40), this is simply not the case: fairness was the underlying theme of the court's decision. The court held that "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' " (Pet.App. 49a, quoting *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 643). The tailoring argument was found to be fundamentally unfair, for when the prosecutor

> raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; *or* 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens. Such commentary is not proper comment on credibility. Lawyers may not raise innuendo relating

> to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. . . . Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative.

Pet.App. 46a (emphasis added). The prosecutor is free to argue that the defendant lacks credibility, but only if "that argument has a basis in fact and not only in innuendo" (47a; *see also* concurring opinion at 68a-69a). The argument was also deemed unfair because respondent had no meaningful opportunity to respond to the charge (conc.opin., 68a-69a).

Thus, it was the particular argument made in this case, not *any* comment on the exercise of Sixth Amendment rights, that drove the court of appeals' due process analysis. In fact, the court explicitly stopped short of ruling that *all* references to the defendant's exercise of his right to be present would constitute *per se* constitutional error – it "express[ed] no opinion as to the propriety or constitutionality of similar remarks made during cross-examination" (Pet.App. 40a). Moreover, its decision on petitioner's rehearing petition had no quarrel with the making of "a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony" (*id.* at 72a). The court of appeals instead ruled that it was improper to raise a tailoring claim for the first time on summation with no supporting evidence, based solely on the defendant's exercise of his Sixth Amendment rights (*id.* at, *e.g.*, 46a, 72a-73a).

The court's Fourteenth Amendment analysis is thus independent from its Sixth Amendment finding of constitutional error, and it is only the latter issue that petitioner sought review of in this Court.

B. The court of appeals' finding of a due process violation was, in any event, completely justified.[7]

As previously discussed (*see* Part I[B], *ante*), the prosecutor did not simply ask the jury to consider respondent's opportunity to tailor his testimony, based solely on the exercise of his confrontation rights without a shred of evidence to support the charge – she actually accused him of tailoring. This was not only a Sixth Amendment violation, but a due process violation as well: the argument was fundamentally unfair and sufficiently egregious to warrant granting of the writ under the Fourteenth Amendment (*see* Part III [A], *ante*).

Petitioner's additional attacks on the court of appeals' due process analysis are equally specious. First,

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[7] Unlike petitioner, respondent's due process arguments are properly before the Court. Respondent is entitled to rely on any argument in defense of the judgment which is supported by the law and the record. *E.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 at n.12 (1997); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 325 at n.3 (1987); *see Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364-65 incl. n.8 (1994). The claims require no further factual development (*cf. Roberts v. Galen*, 119 S.Ct. 685, 687 incl. n.2 (1999), nor is the issue a "far-reaching" one (*South Central Bell Telephone Co. v. Alabama*, 119 S.Ct. 1180, 1186 [1999]), divorced from the grounds relied on by the court below to support its judgment.

its "fair response" argument (Pet.Br., pp.41-42) is, respectfully, as ludicrous as its contention that the charge of tailoring was grounded in the evidence (Pet.Br., p.46; *see* n.5, *ante*). *Of course* defense counsel urged that the complainants were lying, that they were telling a "story" – their accounts completely contradicted respondent's in several material respects, and it was clear that someone was lying. Indeed, it was precisely because credibility was the *only* issue for the jury to resolve that the prosecutor's sweeping tailoring accusation – urging rejection of respondent's account because he had had the unfair "advantage" of listening to the State's witnesses and constructing a tale that neatly "fit . . . into the evidence" – was so prejudicial. However, defense counsel based *his* claims of fabrication firmly on the evidence: *e.g.*, the extensive medical records, the police reports, the photographs of Ms. Winder after she reported the alleged crimes, and the relative reasonableness or unreasonableness of the competing accounts (*see* JA 6-28). Thus, when he characterized Winder's story as "scripted" – an instance specifically cited by petitioner as justifying the prosecutor's "responsive" tailoring accusation (Pet.Br., pp.7, 41) – it was based on her acknowledgment that she had made notes of her encounter with respondent and had consulted them prior to testifying before the grand jury and at trial (JA 17). Similarly, his contention that the two complainants (who had been friends and roommates for years) had "talk[ed] it over" before going to the police to report a rape (JA 15) – also cited by petitioner in support of its "invited response" claim (pp.7, 41) –

reflected testimony given by both women during their direct examinations.[8]

Petitioner also cites certain routine instructions given by the trial court which purportedly "minimized the impact" of the prosecutor's erroneous summation comments (Pet.Br., pp.42-43). On the contrary, when the prosecutor twice makes a specific tailoring accusation that is immediately objected to and the defense is twice overruled, the resulting prejudice cannot possibly be cured by telling the jury later, as part of a series of boilerplate instructions, that what lawyers say is not evidence. *Compare Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985) (death sentence invalidated, where trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them") *with Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 644 (impropriety of prosecutor's comments explicitly flagged to jury by trial court and direct curative instructions also given). Rather than ameliorating the

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[8] *United States v. Robinson*, 485 U.S. 25 (1988), cited by petitioner in support of its 'fair response' claim (Pet.Br., p.42), does not advance its cause. In *Robinson*, defense counsel made a specific argument that the government had precluded the defendant from explaining his side of the story, and the prosecutor responded that as a matter of fact, he had had the opportunity to take the stand and provide whatever explanation he chose (*id.*, at 26). The prosecutor's argument, in short, did not seek to use defendant's silence against him, but simply contested a factual claim that had been raised by the defense. In this case, counsel did not contend, *e.g.*, that respondent had not had the chance to tailor his testimony – which might have invited the response that he had – and instead based his attacks on the complainants' credibility on actual evidence before the jury; as previously noted, the prosecutor's tailoring argument was, in contrast, generic, and had nothing to do with the proof.

prejudice, the trial judge exacerbated it by giving his contemporaneous stamp of approval to the prosecutor's remarks.

Finally, petitioner contends that "the proof of guilt was strong," which "minimized the likelihood that the prosecutor's remarks infected the entire trial" (Pet.Br., p.42). The court of appeals, which reviewed the entire record (Pet.App. 33a), disagreed (*id.*, 33a-35a, 51a), and for good reason: the jurors deliberated an exhausting four days – hardly an open and shut case for the prosecution – and ultimately acquitted respondent of fourteen of the sixteen complainant-based charges they considered (JA 57-60) (one of the counts of which respondent was convicted, felony assault [no intent to cause physical injury required], was subsequently dismissed by the trial court).[9] Clearly, the credibility contest was not easily resolved in the State's favor, and in fact it was almost resolved entirely in respondent's favor. The State's case can be considered "strong," therefore, only if it is assumed that respondent was lying – precisely the issue that was unfairly slanted by the prosecutor's tailoring argument. That respondent was not convicted of all counts hardly evidences that the jury was not swayed by the error; indeed, he may well have been acquitted of the balance of the complainants' charges had his veracity not been unfairly called into question.

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[9] The numerous acquittals included all counts associated with the claim that respondent had threatened both complainants with a gun; in its brief, petitioner treats these alleged threats as established fact. (Pet.Br., p.42).

C. Since respondent was compelled by law to attend his trial, the prosecutor's adverse comments on his exercise of the right to be present violated fundamental notions of fairness and offended due process.

As the dissent noted below (Pet.App. 59a), the defendant has the duty as well as the right to be present at trial. *See Taylor v. United States*, 414 U.S. 17, 20 (1973). In New York, the obligation is codified by statute (N.Y.Crim.Proc.Law 260.10, 340.50; *see* Practice Commentaries to C.P.L. 340.50, p.129 ["As a general rule, a defendant not only has the right to be present but must be present"]). The same rule obtains in federal court, pursuant to Fed.R.Crim.Proc. 43 (with limited exceptions, defendant "shall be present" and has "the obligation to remain"); *see In re United States v. Cannatella*, 597 F.2d 27, 27-28 (2nd Cir. 1979) ("Normally a judge can and should compel a defendant to be present at all stages of a felony trial pursuant to Rule 43[a]"; there is only "a residue of judicial discretion in unusual circumstances where good cause is shown . . . to permit temporary absence"); *United States v. Moore*, 466 F.2d 547, 548 (3rd Cir. 1972) (defendant has no "right of absence").[10]

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[10] In New York, similarly, the defendant "must obtain the permission of the Trial Judge to be absent from a trial" (*People v. Winship*, 309 N.Y. 311, 314 [1955]), and the court's ruling is reviewed under an abuse of discretion standard. *People v. Williams*, 92 N.Y.2d 993, 996 (1998) (defendant's request to waive presence at sidebar questioning of prospective jurors should have been granted, as there were sound "strategic reasons" for such a waiver). Indeed, the primary purpose of bail statutes is to ensure the defendant's appearance in court (N.Y.Crim.Proc.Law 500.10[1]-[3]; 510.30[2][a]), and a bench warrant may be issued

Since the government thus imposes an affirmative duty on the defendant to be present at trial, it would be fundamentally unfair to then punish him for his compliance. *Cf. Doyle v. Ohio, supra,* 426 U.S. 610, 618 (*Miranda* warnings provide implicit assurance that silence will not be penalized, and it thus "would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach [him at trial]"); *Cox v. Louisiana,* 379 U.S. 559, 571 (1965) (where city officials had given defendant permission to demonstrate in certain location, it was violation of due process to convict him for picketing "near" courthouse; this was form of entrapment by the State); *see also Jenkins v. Anderson, supra,* 447 U.S. 231, 240 (impeachment with pre-arrest silence does not violate due process, since "no governmental action induced petitioner to remain silent before arrest"). Clearly, if "to punish a person because he has done what the law plainly *allows* him to do is a due process violation of the most basic sort" (*Bordenkircher v. Hayes,* 434 U.S. 357, 363 [1978] [emphasis added]), it necessarily offends due process to impose a penalty for doing what is *required* by the State.

* * *

The court of appeals found that the prosecutor's comments on summation violated respondent's rights under the Fifth, Sixth and Fourteenth Amendments (Pet.App. 36a-52a). For all the reasons stated, its conclusion that constitutional error was committed is well-

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for his arrest, and his pre-trial confinement ordered, if he breaches his obligation (*see* N.Y.Crim.Proc.Law 510.50, 530.60[1], 530.70) (the federal analogue is 18 U.S.C. § 3142).

founded. The State has not challenged, either in its certiorari petition or its brief on the merits, the court's additional finding that the error was not harmless under the standard enunciated in *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993) (reviewing court must determine whether error had a "substantial and injurious effect or influence in determining the jury's verdict") (*see* Pet.App. 52a-54a; *see also* Solicitor General's amicus curiae brief in support of petitioner, p.25, n.14 [acknowledging that certiorari petition "present[s] only [the] question of whether court of appeals erred in extending *Griffin*"]). Accordingly, that issue should not be reconsidered by this Court. *See Wainwright v. Greenfield,* 474 U.S. 284, 295, n.13, and 296, 301 (concurring opinion of Rehnquist, J.) (1986) (government did not challenge lower court's conclusion that error was not harmless, and that issue was not considered by Supreme Court); *United States v. Hale,* 422 U.S. 171, 175 at n.3 (1975) (same); *cf. United States v. Hastings,* 461 U.S. 499, 506 at n.4 (1983) (Court reviewed harmless error issues rather than conclusion that error in fact occurred: "The question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied"); *see also, e.g.,* U.S.Sup.Ct. Rule 14.1(a); *Yee v. Escondido,* 503 U.S. at 535-38; *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. at 31-32.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

BEVERLY VAN NESS
Attorney for Respondent

August 1999

No. 98-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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September 24, 1999

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THE PROSECUTOR'S COMMENT THAT DEFENDANT HAD AND USED THE UNIQUE OPPORTUNITY TO HEAR THE OTHER WITNESSES AT TRIAL PROMOTED THE RELIABILITY OF THE TRUTH-SEEKING PROCESS AND DID NOT IMPERMISSIBLY BURDEN ANY CONSTITUTIONAL RIGHT OF DEFENDANT.

I. Defendant Has Erroneously Framed The Position Advanced By Petitioner.

As detailed at length in petitioner's main brief, a prosecutor may properly comment that a defendant had a unique opportunity to hear the other witnesses at trial. Because exposure to the testimony of others may affect, either innocently or purposefully, a defendant's testimony, a jury should be permitted to consider that fact when assessing the credibility of a defendant. Allowing for such consideration by the trier of fact serves the fundamental societal interest in the determination of the truth. While a factual predicate existed for the prosecutor's argument here that defendant used his unique opportunity to tailor his testimony, no factual predicate – other than a defendant's mere presence during the taking of testimony – was required to comment on defendant's mere opportunity to hear testimony or to alert the jury to the possible ill effects of defendant's status as a non-sequestered witness.

Defendant has dramatically altered the position of petitioner. Defendant incessantly posits that petitioner is arguing that there is a presumption that a testifying defendant has tailored his testimony, and that a prosecutor may, without any factual predicate other than a defendant's mere presence, present this presumption to the jury. The arguments of defendant all flow from and are dependent upon this skewed restructuring of petitioner's arguments.[1]

The flaw in this approach is that at no time has petitioner ever advanced the claim that there is a presumption of tailoring or a presumption that an accused is less worthy of belief solely due to his non-sequestered status, nor has petitioner alleged that a tailoring argument may be predicated merely upon an

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1. Among the examples of defendant's attempt, along with amicus, to attribute the "presumption of tailoring" to petitioner are: "The State seeks to impugn the credibility of every testifying defendant based solely on the defendant's exercise of his Sixth Amendment right to attend his trial, regardless of whether the State has adduced any evidence that he *tailored* his testimony" (emphasis added)(Resp. Bf. at 6); "This is so, petitioner claims, because in *every* case where an unsequestered defendant takes the stand . . . the inference of *tailoring* is so logical, and the prospect of *tailoring* so likely, that the defendant's exercise of his Fifth and Sixth Amendment rights must be flagged to the jury as a license to commit perjury" (emphasis added)(Resp. Amicus Bf. at 12); "In effect, the state would have this Court hold that it is permissible to create a *presumption* that a testifying defendant who exercises his right to be present at trial has *tailored* his testimony as long as the defendant may be given a chance to attempt to 'rebut' the *presumption*" (emphasis added)(Resp. Amicus Bf. at 21n.9); "The prosecutor's argument also effectively turned the presumption of innocence on its head; the jury was asked to *presume* instead that all defendants who exercise their rights to confrontation and to testify have *tailored* their accounts, and are therefore less worthy of belief than the State's witnesses" (emphasis added)(Resp. Bf. at 24); "The comments at issue in this case . . . do *condemn defendants as a group* as unworthy of belief"(emphasis added) (Resp. Bf. at 29); "The jury is, in effect, invited to *presume fabrication* on the defendant's part in every case. . ." (emphasis added)(Resp. Bf. at 29); "The contention that defendants can uniformly be accused of *tailoring* their testimony, simply by virtue of their presence at trial, implicates Fifth Amendment rights in several respects" (emphasis added)(Resp. Bf. at 29).

accused's presence during the testimony of other witnesses. To reiterate, petitioner has simply argued that a jury should be able to assess the impact of a defendant's exposure to the testimony of others and, in its capacity as the trier of fact, draw reasonable inferences from that fact. That exposure may affect the defendant's testimony either consciously, through deliberate tailoring, or subconsciously, through confabulation. Permitting this consideration by the jury does not give rise to a presumption of tailoring. Rather, it merely allows the jury to consider and weigh a circumstance that bears directly on the credibility of a defendant's testimony.

Additionally, contrary to defendant's view, at no time has petitioner argued that a tailoring argument may be built on nothing more than a defendant's mere presence at trial during the taking of testimony. Rather, petitioner explicitly and repeatedly argues that no greater factual predicate is required to comment on the mere opportunity to hear other witnesses and the concomitant impact on a defendant's credibility, not that an affirmative claim of tailoring may be made without foundation.

With the actual analytical framework advanced by petitioner properly restored, many of the arguments rendered by defendant, wholly dependent as they are on the non-existent and baseless "presumption argument," fall by the wayside.

II. Defendant Has Failed To Show That The Prosecutor's Comments Did Not Further the Fundamental Societal Interest In The Determination Of The Truth; Defendant's Attempt To Insulate The Jury From Considering The Possible Impact On Defendant's Credibility Of His Exposure To The Testimony Of Other Witnesses Should Be Rejected.

Comments alerting a jury to a fact touching directly upon the reliability of the evidence at trial, that being a defendant's immunity from the witness-sequestration rule and its concomitant impact on his credibility, materially advance the broad fundamental societal interest in the ascertainment of truth at trial. *See* Pet. Bf. at 14-15, 27-30. This position is assailed by defendant, who argues that reliance on a defendant's exposure to the testimony of other witnesses as an impeachment device should be proscribed. The reasons given by defendant are 1) the risk of a witness "coloring" his testimony is so negligible, as evidenced by codified and other exemptions to the witness-sequestration rule, as to render meaningless the significance of a witness's attendance during the testimony of others; 2) the risk of tailoring by a defendant is even less than that of an ordinary witness and virtually non-existent as to material facts; and, 3) the prosecutor has other options in his arsenal of impeachment weapons. Resp. Bf. at 14-20. Defendant's arguments should fail.

First, this Court has repeatedly recognized the value of the witness-sequestration rule. *See*, e.g., *Perry v. Leeke*, 488 U.S. 272, 281-282 (1989); *Geders v. United States*, 425 U.S. 80, 87 (1976); *Brooks v. Tennessee*, 406 U.S. 605, 607, 611 (1972). *See also* Pet.Bf. at 27-29. While some witnesses are

exempt from the rule by statute or within the discretion of the State trial court, those witnesses are still subject to attack based on their exposure to the testimony of other witnesses. This is in recognition of the risk that their testimony may be affected by their hearing the testimony of others.

Indeed, despite attempts to downplay the value of the witness-sequestration rule, even defendant acknowledges on numerous occasions throughout his brief that the concerns behind the rule of sequestration are justified.[2] If, as defendant concedes, the sequestration rule is designed to hinder "the occasional readiness of the interested person to adapt his testimony" (Resp. Bf. at 17 [citation omitted]), then, as petitioner has argued, a jury should be permitted to determine as the trier of fact whether the witness in question – whether or not it is the defendant – has fallen victim to that inclination.

Notably, even the cases relied upon by defendant (Resp. Bf. at 19-20) state as much. For example, in *Geders v. United States*, *supra*, this Court struck down an overnight ban of contact between a defendant and his lawyer -- designed to eliminate the possibility of unethical coaching -- on the ground that it unduly burdened the right to counsel. Nonetheless, the Court went on to state that the prosecutor could, without unduly infringing upon the right to counsel, bring the fact of the defendant's opportunity for unethical coaching before the jury by cross-examining the defendant about the nature of his contact

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2. These acknowledgements occur at various points in the brief:, "[A]t most, the defendant's opportunity to hear other witnesses *might* serve to explain how he happened to modify or shape his testimony . . ." (Resp. Bf. at 15); "[T]he risk of tailoring based on presence while others testify is *generally* lower for defendants than other witnesses . . ." (emphasis added) (Resp. Bf. at 16); "Defendant does not contend that sequestration has no validity in curbing the tailoring of testimony" (Resp. Bf. at 17).

with his lawyer. 425 U.S. at 89-90.

Similarly, in *Brooks v. Tennessee*, *supra*, this Court struck down a statute that required a defendant who wished to testify to do so before the prosecution witnesses testified, because it unduly burdened a defendant's right to testify. 406 U.S. at 607. But, in addressing the acknowledged "risk of a defendant's coloring his testimony" due to his presence during the testimony of others, this Court added that "our adversary system reposes judgment of the credibility of all witnesses in the jury." 406 U.S. at 611-612. In other words, a jury may consider that risk in assessing a defendant's credibility. This is the argument advanced by petitioner. Thus, in both *Brooks* and *Geders*, this Court held that the prosecution may properly alert the jury to the possibility of a defendant perverting a constitutional protection into an improper litigation advantage without such reference unduly burdening the underlying constitutional right.

Defendant's second argument is no more availing. In a persistent effort to minimize the ill effects of exposure to the testimony of others, defendant assumes that there is a decreased risk of tailoring where the defendant is the witness because of the defendant's greater pre-trial access to information about the case through discovery and his attorney. Resp.Bf. at 6-7, 16-17. Defendant even states that the "risk of tailoring [by a defendant] is virtually non-existent with respect to material facts" (Resp. Bf. at 16). Notably, defendant cites no authority -- other than conjecture -- for this proposition. This Court, however, has explicitly recognized the "risk of coloring" by a defendant. *See, e.g., Brooks v. Tennessee*, 406 U.S. at 611 ("This is not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before"). Moreover, access to information pre-trial does not necessarily dampen an inclination

to tailor testimony, because of the typical deviation between pre-trial statements and trial testimony. Even a defendant "cannot be absolutely certain that his witnesses will testify as expected . . . ." *Brooks v. Tennessee*, 406 U.S. at 609. Most importantly, however, this argument of defendant ignores the innocent side effects of exposure to testimony that might affect a non-sequestered witness, such as confabulation. Even if the risk of tailoring were diminished, this other effect of exposure to other witnesses may still be present.

Third, defendant argues (Resp. Bf. at 14,21) that a prosecutor should not be permitted to rely on a defendant's opportunity to hear testimony as a subject for impeachment because of alternative means by which to impeach a defendant's credibility. But the only "alternative means" identified by defendant is cross-examination based on a lack of conformity between a defendant's pre-trial statements and trial testimony. No other "means" are identified, nor does defendant identify other impeachment options in the usual case where a defendant exercises his right to remain silent and fails to render pre-trial statements. Moreover, even assuming that other impeachment options exist, this credibility factor would still be relevant. Indeed, considering that even defendant concedes that a defendant's exposure to the testimony of others "might" affect his testimony, he is hard-pressed to argue that such a fact is not in and of itself relevant to the jury's resolution of credibility issues, particularly under the liberal definition given to the term "relevant evidence." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). *See also* F.R.E. 401. And, in this case, where, as defendant and amicus for defendant concede, credibility is the dispositive issue, the existence of other impeachment fodder would not render relevant evidence bearing on the issue of credibility "needlessly cumulative." F.R.E. 403. *See District of Columbia v. Clawans*,

300 U.S. 617, 632 (1937); *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993).[3] Particularly under such circumstances, the prosecution should not be prevented from presenting all available arguments pertaining to a defendant's credibility or be bound to stop after the presentation of minimum evidence on the subject. *Cf. People v. Alvino*, 71 N.Y.2d 233, 245 (1987).

III. Defendant Has Failed To Demonstrate That The Prosecutor's Comments Deprived Defendant Of A Constitutionally Protected Right Or Imposed An Undue Burden On The Exercise Of A Right.

Petitioner demonstrated in its main brief (Pet. Bf. at 30-44) that permitting reference to a defendant's exposure to the testimony of other witnesses and its concomitant impact on his credibility does not impair any constitutional rights of an accused. While such comment deprives a defendant of the fictitious "right to the opportunity to fabricate or conform testimony without comment" referred to by the Second Circuit (Pet. Cert. at 44a n.11), it otherwise does not interfere with a defendant's full expression of his right to confront witnesses, right to testify, and right to due process.

Defendant states that allowing a presumption of tailoring based upon a defendant's mere presence at trial casts an impermissible burden on the confrontation right and the right to testify. This is because, according to defendant (Resp. Bf. at

3. These concessions include: "With credibility the only issue for the jury to decide . . ." (Resp. Bf. at 11); "credibility was the *only* issue for the jury to resolve . . ." (Resp. Bf. at 38); reference to case as a "credibility contest" (Resp. Bf. at 40); "The credibility of these [the prosecution witnesses] was thus at the heart of the case" (Amicus for Resp. Bf. at 3).

12), an accused is powerless to rebut the tailoring presumption in any effective way unless he is willing to forgo the exercise of either his confrontation right or his right to testify. Defendant adds that he is further handicapped by this so-called tailoring presumption because it undercuts the presumption of innocence and thereby improperly aids the prosecution in meeting its burden of proof. Defendant is wrong.

As a threshold matter, this argument, like others of defendant, rests on the mistaken premise that petitioner is advocating a presumption of tailoring. This misplaced reliance alone is reason to discount this argument. Moreover, a jury's mere consideration of the possible effects of defendant's listening to other witnesses, in light of their observations of defendant on the stand and other considerations, does not burden every defendant; rather, it merely allows a factor relevant to credibility to be weighed.

In any event, permitting the fact of the defendant's non-sequestered status to be considered by the jury does not force an election of rights by a defendant. Essentially, this argument of defendant rests on the unsupported belief that it is "virtually impossible" (Resp. Bf. at 7, 12) for a defendant to counter effectively the negative inferences a jury might draw from a defendant's presence during testimony shy of waiving either the right to confront witnesses or the right to testify. In pressing this overstatement, defendant posits (Resp. Bf. at 7, 30-33) a number of unreasonable ways in which a defendant could counter such negative inferences -- e.g., waiving the right to remain silent and issuing pre-trial statements, or waiving the attorney-client privilege and disqualifying his attorney who would then testify concerning defendant's pre-trial statements -- and then highlights the patent flaws in those alternatives.

But an effective remedy overlooked by defendant -- in addition to remedies previously suggested by petitioner (Pet. Bf. at 36-37) -- is the simple expedient of summation comment by defense counsel. A defense attorney can address in summation all arguments that an unfavorable inference should be drawn against the defendant. For example, just as defendant argues now, he can argue in the trial court that a "fit" between the defendant's testimony and that of prosecution witnesses is proof of the defendant's truthfulness, rather than any tailoring. It would be up to the jury to determine the weight to be accorded that argument.

Defendant's suggestion that he cannot anticipate that a prosecutor will make such a tailoring argument or the factual predicate for such an argument must be rejected. In many jurisdictions, it is the role of a defense attorney to anticipate what arguments will be made by the prosecutor, and he must do so routinely, on every matter subject to argument. *See* Pet. Bf. at 37n.15. This is true in New York, where by statute a defense attorney's closing argument precedes that of the prosecutor, and defendant never has an opportunity to respond to a prosecutor's argument after the fact. *See* New York Criminal Procedure Law § 260.30. Requiring him to do so in this context imposes no greater burden on defendant. Additionally, requiring a defendant to anticipate that a prosecutor in summation will refer to his non-sequestered status is functionally indistinguishable from requiring him to anticipate arguments concerning his interested witness status, arguments that are legally sanctioned. *See* Pet. Bf. at 21.

Equally baseless is defendant's notion that the presumption of innocence is undermined or "turned . . . on its head" by a jury's consideration of a defendant's non-sequestered status on the issue of credibility. Resp. Bf. at 7,13,24,27.

Notably, this argument rests on the existence of the "presumption of tailoring," which, to reiterate, is not being advanced by petitioner. In any event, consideration by a jury of this fact is no more detrimental to the presumption of innocence than is the proper consideration of a defendant's interested witness status. *See United States v. Hill*, 470 F.2d 361, 365 (D.C.Cir.1972)("We wholly fail to see how the [interested witness] instruction trespasses upon the statutory authorization or the presumption of innocence since it merely treats his [the defendant's] evidence the same as that of any other witness with a very special interest"). Just as all defendants -- innocent and guilty -- are subject to an interested witness charge, all defendants -- innocent and guilty -- who sit through the testimony of other witnesses are subject to the ills of non-sequestration (e.g., innocent confabulation) and a jury may consider that fact.

Defendant seeks to distinguish comments on a defendant's status as an interested witness from comments on a defendant's ability to hear other witnesses by claiming that interested witness comments do not single out defendants from other witnesses, whereas consideration of a defendant's non-sequestered status does just that. This claim rests on defendant's mistaken belief that exemption from the witness-sequestration rule is a right uniquely afforded a defendant.[4] (Resp. Bf. at 9). The reasoning does not withstand scrutiny. While, unlike other witnesses, only a defendant has a confrontation right, as statutory law and decisional law make

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4. *See, e.g.*, "[D]efendants, unlike other witnesses, have confrontation rights, and defendants alone would be subject to a sweeping charge of tailoring grounded on that circumstance" (Resp. Bf. at 9); "[H]e [the defendant] alone has the privilege of listening to others testify . . ." (Resp. Bf. at 27).

plain (see F.R.Cr.P. 615 [5]; Pet. Bf. at 29), exemption from the witness-sequestration rule is not an opportunity solely afforded an accused. And allowing a jury to consider a defendant's unsequestered status where there are no other unsequestered witnesses no more burdens rights of a defendant than allowing a jury to consider a defendant's interest in the outcome when (as is typically the case) there are no other interested witnesses. In such instances, a defendant is not being singled out because of his exercise of a constitutional right, but rather because of factors (a special interest in the outcome or exposure to the testimony of others) that bear directly on his credibility.

IV. The Due Process Issue Is Properly Before This Court.

Defendant contends that petitioner is proscribed from addressing the due process argument because it was not included, as required by Rule 14.1 of the Rules of this Court, in the Question Presented in petitioner's Petition for a Writ of Certiorari.[6] According to defendant, the due process claim represents a basis for affirmance independent of the issue of whether the Second Circuit improperly extended the scope of *Griffin*. The record in this case does not allow for such a conclusion.

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5. F.R.Cr.P. 615 provides: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present."

6. Rule 14.1 states, inter alia: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."

First, the language of the Second Circuit's two decisions leaves no question that the reversal of the conviction -- including the due process issue -- was predicated solely on a *Griffin* analysis, with that analysis serving as the underpinning of the finding of three constitutional violations (involving the right of confrontation, the right to testify, and the right to due process). The *Griffin* decision pervades the Second Circuit's decision; that court repeatedly refers explicitly to *Griffin* in its "Defendant's Right to Confrontation" and "Right to Testify On One's Own Behalf" sections (*see e.g.*, Pet. Cert. at 42a, 43a, 48a). Then, in its section entitled, "Right to Due Process of Law," the Second Circuit (Pet. Cert. at 50a) presupposes error with that error consisting of the *Griffin* violation spoken of in the two previous sections of the decision. As the Second Circuit stated, when "commentary goes to the heart of the constitutionally guaranteed rights to be present at trial and testify on one's own behalf, the very fairness of the entire trial is compromised." Thus, the due process violation found by the Second Circuit was directly predicated on its findings that the prosecutor had violated defendant's *Griffin*-based right of confrontation and right to testify.

If there is any doubt as to this interpretation, it is extinguished upon reference to the Second Circuit's decision upon the petition for rehearing. In that decision (Pet. Cert. at 73a), the Second Circuit refers to the existence of "the constitutional issue" in the singular and then cites only to *Griffin* in characterizing the nature of that issue. That the Second Circuit's analysis under *Griffin* consists of three components does not alter this conclusion.

Second, the dissent below refers to the *Griffin*-based nature of the Second Circuit's decision. At one juncture the dissent speaks of how "my colleagues treat [*Griffin*] as a

guiding star for the grant of relief herein" (Pet. Cert. at 56a).

Third, that the three sub-issues in this case all blend together on some levels and revolve around *Griffin* is evidenced by defendant's own due process analysis. At one juncture (Resp. Bf. at 35), when referring to the due process finding of the Second Circuit, defendant states that the "tailoring argument was found to be fundamentally unfair" and then proceeds to quote language from the Second Circuit's section pertaining to the confrontation claim, which relies heavily on *Griffin*! Thus, even defendant has difficulty trying to separate the Second Circuit's *Griffin* analysis from its due process finding.

Certainly defendant cannot claim "surprise" at the fact that petitioner has included the due process issue in its brief. The Second Circuit explicitly relied upon three grounds -- all *Griffin*-related -- to reverse the conviction. Defendant cannot seriously contend that it was not on notice that petitioner was seeking certiorari on all three grounds as subsumed within the *Griffin* issue; it is nonsensical to suggest that petitioner would only advance within the question presented two of the three grounds necessary to reverse the decision of the Second Circuit. Moreover, in its brief in opposition to the Petition for a Writ of Certiorari, defendant did not argue that this Court should not grant the writ on *Griffin* grounds in view of the "independent" due process ground for affirming the Second Circuit decision. The reason was because of defendant's awareness that the due process ground -- like the confrontation and right to testify issues -- was "fairly included" in the question presented.

Remarkably, while stating that petitioner cannot address the due process issue, defendant claims that it may raise the very same issue as a basis for affirming the ruling of the Second Circuit. While as the prevailing party the defendant may defend

the decision of the Second Circuit on any ground properly raised below (*see Northwest Airlines v. County of Kent, Michigan*, 510 U.S. 355, 365n.8 [1994]), defendant seemingly is arguing that it can raise an issue in favor of affirmance to which petitioner is proscribed from responding. The illogic of that position is manifest.

Against this backdrop, it is clear that the due process question is "fairly subsumed" (*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 [1991]), or "fairly embraced within" (*LeBron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 [1995]), or "fairly included" in the question presented for review. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 381n.3 (1992); *Greer v. Miller*, 483 U.S. 756, 761n.3 (1987); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 94n.9 (1982). Certainly, the relationship between the *Griffin* issue and the due process issue is "close enough [for the due process issue] to come, if by the barest of margins, within those 'subsidiary question[s] fairly included' in the principal question on appeal." *Arkansas Elec. Co-op v. Arkansas Pub. Ser. Com'n*, 461 U.S. 375, 382n.6 (1983).[4]

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7. While hesitant to do so, this Court can still consider an issue not raised in the petition for certiorari. *Izumi Seimitsu v. U.S. Philipps Corp.*, 510 U.S. 27, 31-32 (1994). The Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559n.6 (1978); *Blonder-Tongue Laboratories Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 320n.6 (1971). Considering that the issue was presented and ruled upon by the Second Circuit, fully briefed by both parties, and that defendant is relying on it as a basis for affirmance, even if the due process point was not "fairly included" in the question presented, this Court should reach it anyway.

V. The Prosecutor Provided A Factual Basis For Her Comments That Defendant Tailored His Testimony.

Petitioner previously delineated the factual predicate for the prosecutor's claim that defendant tailored his testimony. *See* Pet. Bf. at 45-47. Buried in a footnote is defendant's challenge to the quality of this factual predicate. Petitioner will respond briefly to defendant's claims.

First, defendant states that the prosecutor's characterization of defendant as a "smooth slick character" is merely a "subjective description" and not evidence. As petitioner demonstrates in its main brief (Pet. Bf. at 45-46), a witness's demeanor on the witness stand, however, does indeed constitute evidence to be considered by the jury, and such evidence may alone lead to a conclusion that testimony is tailored.

Second, defendant argues that the prosecutor's statement that defendant's testimony sounded "rehearsed" was not based on defendant having tailored testimony, but rather on his having repeated certain testimony on both direct and cross-examination. Therefore, according to defendant, such testimony was not offered as proof of the tailoring accusation. That testimony is repeated and therefore sounds rehearsed, however, is entirely consistent with it having been thought out in advance and tailored.

Third, defendant states that a "fit" between defendant's testimony and that of the prosecution witnesses was not proof of tailoring but could indicate the truthfulness of defendant's testimony. Certainly, as even the Second Circuit recognized (Pet. Cert. at 72a), such testimonial conformity can indeed be a

sign or evidence of tailoring. Moreover, whether or not such conformity is due to "coloring" of testimony or truthfulness is a question for resolution by the jury as the trier of fact; the possibility that more than one inference can be drawn from such evidence does not eliminate such evidence as proof of tailoring.

Fourth, defendant complains that the prosecutor's statement that defense counsel made a particular argument at trial "because it fits the whole scenario here" did not refer to tailoring by the defendant but merely to argument of defense counsel. Ignored by defendant, however, is that defense counsel's argument was based on an explanation provided by defendant himself during his testimony, which explanation was built around the testimony of the complainant. In stating that defense counsel raised an argument that "fit the whole scenario here," the prosecutor was thus attacking the testimony underlying defense counsel's argument; she was not accusing defense counsel of positing arguments known by defense counsel to be false.

Fifth, defendant argues that the prosecutor could not properly rely on defendant's testimony that he had been slapped by the complainant -- raised for the first time on cross-examination -- as proof of tailoring because the complainant herself never testified to that fact. This argument rests on the erroneous and narrow view of tailoring as only consisting of testimony that conforms to that of other witnesses. Tailored testimony can also consist of testimony that deviates from that of other witnesses in order to explain the existence or occurrence of irrefutable facts, such as when defendant here sought to explain the cause of the complainant's injuries. Indeed, short of a confession on the witness stand, a defendant's tailored testimony can never mirror that of a complainant.

* * * *

Absent defendant's erroneous reliance on the presumption of tailoring, which is not advanced by petitioner, defendant offers no reasonable explanation as to why a jury should not be allowed to consider the impact on a defendant's credibility of his exposure to the testimony of other witnesses. Because this circumstance goes directly to the fundamental goal of truth-seeking, and because it does not realistically impede the exercise of a defendant's rights, a jury may properly consider it, along with other constitutionally permissible evidence that may be used to impeach a defendant.

Respectfully submitted,

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September 23, 1999

(10)

No. 98-1170

In the Supreme Court of the United States

LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, PETITIONER

v.

RAY AGARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether it violates the Constitution for the prosecution to comment during closing argument that the defendant's opportunity to hear the testimony of all other witnesses before taking the stand enhanced his ability to fabricate testimony.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented is whether it is unconstitutional for the prosecution to observe, during closing argument, that the defendant's opportunity to hear the testimony of all other witnesses before testifying enhanced his ability to fabricate his own testimony. This Court's resolution of that question, and its treatment of the "penalty" analysis on which the court of appeals relied, see *Griffin* v. *California*, 380 U.S. 609 (1965), will affect federal as well as state prosecutions. The United States accordingly has an interest in the proper resolution of the question presented.

STATEMENT

1. On Friday, April 27, 1990, respondent met Nessa Winder and Breda Keegan at a Manhattan bar and nightclub. At respondent's invitation, Winder accompanied him to his apartment, where she spent the night and had sex with him. The next week, on May 6, Winder and Keegan met respondent at the same nightclub. Both ultimately returned with him and two of his friends to his apartment. The State presented evidence that respondent committed an assault on Keegan and, after Keegan had left, threatened Winder's life with a handgun, raped her, and subjected her to repeated acts of forcible anal and oral sodomy. He also struck her so badly in the eye that it began to seal shut. Pet. App. 15a-22a; Tr. 88.[1]

The next day, May 7, 1990, Winder found a message from respondent on her answering machine. In that message, respondent remarked that "this entire situation" was his "fault" and that he would "never bother you again." Pet. App. 21a. On May 8, 1990, the police executed a search warrant at respondent's apartment and seized a .45 caliber automatic handgun and two magazines containing shells. Following his arrest, respondent first denied that he had a gun, then admitted having it but claimed that it was not real, did not work, or belonged to a friend. *Id.* at 21a-22a.

2. Respondent's defense at trial was that Winder and Keegan had falsely accused him, that he and

[1] After leaving respondent's apartment, Winder called Keegan and the two proceeded to the police station. Pet. App. 21a. Later that day, when Winder arrived at the emergency room of a hospital, the examining physician found no vaginal or anal trauma. *Ibid.* He did, however, find that Winder had bruises, a cut lip, and a black eye. *Id.* at 66a.

Winder had engaged only in consensual sex, and that he had struck Winder only as a reflex after she slapped and scratched him. Pet. App. 22a-24a. In its opening argument, the defense urged the jury to find that Winder had cleverly fabricated her story by "mix[ing] in as much truth as possible" among her "lies" to "make the lies more effective." Tr. 29, 31.

After the close of the State's evidence, respondent took the stand in his defense. His testimony largely squared with that of Winder and Keegan concerning the events of the first weekend, although their stories diverged somewhat on the nature of their sexual relationship. See Pet. App. 15a. Respondent's version of the events of May 6, 1990, however, contrasted sharply with that of the State's witnesses. Respondent testified that he and Winder woke up in his apartment after a night on the town, engaged in consensual vaginal intercourse, and fell back asleep. Upon reawakening, he said, they quarreled over the lateness of the hour, Winder slapped him and scratched his lip, and he struck her reflexively. *Id.* at 22a-24a; Tr. 670-672, 722. Then, he claimed, he let Winder leave the apartment. Pet. App. 23a.

During summation, the defense repeatedly charged that the prosecution witnesses were lying and added: "[A] good or an effective lie often mixes in elements of truth, and Miss Winder's script was effective." J.A. 17. The prosecutor then presented the State's final argument. She began by noting that respondent's essential defense was that Winder and Keegan "were lying" and that respondent himself was "[t]he victim of all the lies." J.A. 30. The prosecutor then exhaustively summarized the facts of the case and identified a variety of respects in which the testimony of the complaining witnesses, and in particular Winder's testimony, was

more believable than respondent's testimony. J.A. 30-49.[2] Toward the end of her closing argument, the prosecutor observed that "[a] lot of what [respondent] told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." J.A. 46-47. She added, over defense objection:

> You know, ladies and gentlemen, unlike all the other witnesses * * * the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> He's a smart man. I never said he was stupid. * * * He used everything to his advantage.

J.A. 49 (objections omitted). The prosecutor then continued to review the factors that lent credibility to Winder's testimony and reminded the jury of its obligation to decide the case on the evidence. J.A. 49-52. After the closing, respondent moved for a mistrial on numerous grounds. One of those grounds was the claim

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[2] The prosecutor focused on the details of Winder's recollection and on the implausibility of her having fabricated a story that involved such humiliating experiences. See J.A. 36-40. The prosecutor also challenged respondent's claim that he struck Winder reflexively, reminded the jury of the taped message in which respondent acknowledged fault, and noted that respondent was a convicted felon who had admitted to lying repeatedly on various job applications. See, *e.g.*, J.A. 31, 44-48.

that "[i]t is improper to make comments to the jury that they should not believe [respondent] due to his exercise of his constitutional rights to be present at his trial." J.A. 54. The court denied the motion. J.A. 54-56.

Nineteen sodomy and assault counts against respondent were submitted to the jury; 14 of the counts concerned Winder, and two concerned Keegan. The remaining three counts were weapons charges. The jury convicted respondent on one count of sodomy, on one count of felony assault in which rape was the underlying felony, and on two counts of third-degree weapons possession; he was acquitted on the remaining charges. The trial court dismissed the assault conviction as repugnant to respondent's rape acquittal. Pet. App. 23a-24a. The New York Supreme Court affirmed respondent's sodomy conviction, but reversed one of the [redacted] weapons possession convictions. *Id.* at 14a, 24a. The New York Court of Appeals denied leave for further appeal. *Id.* at 14a.

3. Respondent filed a habeas corpus petition in federal district court, claiming that the prosecutor's comments had violated his Sixth and Fourteenth Amendment rights. The district court denied the petition but granted a certificate of probable cause allowing respondent to appeal. Pet. App. 1a-11a.

a. In its initial decision, a split panel of the Second Circuit found that respondent's sodomy conviction was invalid and ordered that he be "release[d] after he has served his sentence on the weapons possession conviction, unless the state affords him a new trial within sixty days from the issuance of our mandate." Pet. App. 54a. Judge Oakes, writing only for himself (*id.* at 13a-54a; compare *id.* at 67a-69a), analogized the case to *Griffin* v. *California*, 380 U.S. 609 (1965), in which this Court held it unconstitutional for a trial court or the

prosecution to invite the jury to infer the truth of the prosecution's evidence from a defendant's failure to testify. Here, Judge Oakes found, the prosecutor's remarks imposed an unconstitutional "penalty" on respondent's exercise of several different constitutional rights: due process, the right to testify on one's own behalf, and, most important, the right of a criminal defendant to be present at trial, which is ultimately derived from the Confrontation Clause of the Sixth Amendment. See generally *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). In his view, such comments "force defendants either to forgo the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion," in violation of the Sixth Amendment. Pet. App. 41a.

Judge Oakes rejected the State's argument that the prosecutor's need to attack a testifying defendant's credibility justified the remarks in question. Pet. App. 44a. He found that while it is proper for a prosecutor to cross-examine a witness about parts of his testimony that "have indicia of fabrication," it is improper for a prosecutor to "raise[] the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial." *Id.* at 46a; *id.* at 44a n.11 (*Griffin* "maintains the opportunity of a defendant to fabricate or conform testimony without comment"). Finally, applying the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), Judge Oakes held that the prosecutor's comments warranted habeas relief on the ground that they directly impaired respondent's credibility, which was the primary issue at trial, and could have been the sole reason that the jury

credited the victim's version of events. Pet. App. 53a-54a.

Judge Winter concurred in the result on narrower grounds. Pet. App. 67a-69a. He relied on the following factors: that "the only evidence supporting the inference that [respondent] tailored his testimony to the prosecution's case was his presence in the courtroom and that testimony itself"; that "New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence"; and that "the prosecutor's argument was not harmless." *Id.* at 68a-69a.

Judge Van Graafeiland dissented. Pet. App. 54a-67a. He first observed that, as the jury must have known, respondent was in the courtroom the whole time because defendants are required to attend their trials. Thus, he explained, the prosecutor's remarks could not have "penalized" respondent's exercise of his right to attend trial; no juror would "ris[e] to his feet in the jury room and say[], 'If [respondent] is innocent, he would not have sat in the courtroom during the entire trial.'" *Id.* at 61a. Further, in Judge Van Graafeiland's view, the issue of fabrication was not raised for the first time in summation; rather, the specter of fabrication had permeated the entire trial. Thus, the majority was wrong in concluding that there were no facts in evidence to support the inference of fabrication. Moreover, Judge Van Graafeiland concluded, if the prosecutor's comments were as improper and harmful as Judge Oakes found, defense counsel could have requested permission to put respondent back on the witness stand. *Id.* at 65a.

b. On rehearing, the panel stood by its original result but, in an opinion by Judge Winter, "retreat[ed]

from any language in our prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony." Pet. App. 72a; see also *United States* v. *Chacko*, 169 F.3d 140 (2d Cir. 1999) (adopting narrow view of the court's holding in this case). But, the majority added,

> [t]he prosecutor in the present case did something quite different, * * * arguing that "unlike all the other witnesses in this case [respondent] has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage, doesn't it." This was not a factual argument based on [respondent's] testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony. The prosecutor's argument was not based on the fit between the testimony of [respondent] and other witnesses. Rather, it was an outright bolstering of the prosecution witnesses' credibility vis-a-vis [respondent's] based solely on [respondent's] exercise of a constitutional right to be present during trial.

Pet. App. 72a. The majority concluded that "the constitutional issue here is somewhat similar to that in *Griffin*." *Id.* at 73a.[3] Judge Van Graafeiland again dissented, on grounds similar to those set forth in his first dissent. *Id.* at 75a-78a.

[3] The majority held that the State had waived (and could waive) its argument, which it raised for the first time on rehearing, that respondent's constitutional claims were barred under *Teague* v. *Lane*, 489 U.S. 288 (1989). The State has not petitioned for certiorari on that issue.

SUMMARY OF ARGUMENT

Any witness's familiarity with the testimony of other witnesses gives him a natural advantage: it enables him, if he wishes to fabricate a story, to tailor his version of events to avoid unnecessary conflict with the testimony of those other witnesses. That consideration is relevant to his credibility, and counsel may fairly bring it to the attention of the jury. Respondent's essential claim here is that the Constitution prohibits such comment when the witness in question is a criminal defendant. That position, however, violates the basic principle, established in more than one hundred years of this Court's precedent, that a defendant who elects to testify in his own defense is subject, as a witness, to the same fair comment on his credibility as any other witness.

In reaching its contrary conclusion, the majority below relied on the "penalty" analysis of *Griffin* v. *California*, 380 U.S. 609 (1965). That reliance is unsound. In *Griffin*, this Court held that, as a corollary to the Fifth Amendment right against compelled self-incrimination, the prosecution may not comment on the defendant's silence at trial, and the court may not instruct that a defendant's failure to testify is evidence of guilt. The Court reasoned that such adverse comment would "penalize" a defendant's right not to testify by encouraging the jury to believe that the defendant had exercised the right because he is guilty. No analogous concern arises here, because no juror would find a defendant's presence at trial even remotely suspicious.

The prosecutor's comments in this case invited the jury to consider respondent's presence at trial not as substantive evidence of his guilt, but as a factor relevant to his credibility *as a witness*. *Griffin*'s "penalty" analysis has no application in that setting.

In its decision on reconsideration, the majority below limited its *Griffin* analysis to cases in which the prosecution makes "not a factual argument based on the defendant's testimony in this particular case[,] but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." Pet. App. 72a. As an initial matter, the proposed distinction between impermissibly "generic" and permissibly "factual" comments is indeterminate and unworkable, as this case itself illustrates. Moreover, nothing in the Constitution bars the prosecution from making fair generalizations about the credibility of a testifying defendant. Indeed, this Court itself has upheld jury instructions (similar to those given in this case) that identify any criminal defendant as an inherently interested witness whose testimony should be viewed with commensurate skepticism. Such instructions are at least as "generic," and potentially more influential, than the prosecutorial comments at issue here.

More fundamentally, the majority's narrowing of its earlier decision did nothing to resolve the decision's underlying conceptual problem: *Griffin*'s "penalty" analysis is simply inapplicable in this context, no matter how "generic" the prosecutor's comment may be. There may be cases, unlike this one, in which official comment on a testifying defendant's presence at trial is unfair because it is irrelevant to his credibility. Such comment, however, would be subject to challenge on

the same basis as any other irrational attack on a testifying defendant; it is not properly subject to special scrutiny under a "penalty" analysis.

ARGUMENT

THE PROSECUTOR'S COMMENT ON RESPONDENT'S UNIQUE OPPORTUNITY TO HEAR THE TESTIMONY OF OTHER WITNESSES BEFORE TAKING THE STAND WAS NOT UNCONSTITUTIONAL

The trial in this case was a contest between two competing accounts of the underlying events. From the opening argument, the defense argued that "the complaining witnesses"—and particularly Nessa Winder—were "lying." Tr. 29. The defense further insisted that Winder's lies were clever ones: that she had "mixe[d] in as much truth as possible" in her account "to make the lies more effective." Tr. 29, 31; see also J.A. 17. In that respect the defense's argument was analogous to the State's; the prosecutor observed that "[a] lot of what [respondent] told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." J.A. 46-47. The issue in this case is whether respondent's conviction should be vacated because, as part of the same argument, the prosecutor asked the jury to consider, as one factor in evaluating these mutually contradictory accounts, respondent's opportunity to hear the complete testimony of the State's witnesses before offering his own version of events. There are two steps to the inquiry: was that factor *relevant* to the jury's deliberations; and, if so, does the Constitution nonetheless prohibit the government from encouraging the jury to consider it?

A. The Constitution Does Not Prohibit Official Comment Relevant To A Defendant's Credibility As A Witness

1. The factor that the prosecutor asked the jury to consider—the advantage to respondent of taking the stand only after the State's witnesses had testified—was plainly relevant to the jury's evaluation of respondent's testimony and, therefore, to its ultimate determination of his guilt or innocence. It is broadly accepted that witnesses will be more truthful, or at least less successful in fabricating testimony, if they do not first learn how other witnesses have testified. See *Perry* v. *Leeke*, 488 U.S. 272, 281-282 (1989). That is why both the federal system and many state courts provide for the sequestration of witnesses at trial, thereby insulating them from the testimony of other witnesses. See, *e.g.*, Fed. R. Evid. 615; *People* v. *Medure*, 683 N.Y.S.2d 697, 699 (N.Y. Sup. 1998) (under New York law, a "motion for exclusion of witnesses is addressed to the sound discretion of the court"). "The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony. * * * If the hearing of an opposing witness were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." 6 *Wigmore on Evidence* § 1838, at 461 (Chadbourn rev. 1976) (emphasis omitted) (quoted in *Medure*, 683 N.Y.S.2d at 699); accord *Perry*, 488 U.S. at 281-282.

Respondent could not have been sequestered, because, as a defendant, he had both the constitutional right and, under New York law, the legal obligation to attend the entirety of his trial. See p. 21, *infra*. Precisely because he was not sequestered, however, he

enjoyed the advantage that sequestration is designed to foreclose: the ability to adjust his testimony to fit, so far as possible, the facts established in the prosecution's case-in-chief. If he had been kept ignorant of the testimony of the State's witnesses before he testified, it would have been more difficult for him to have fabricated a successful but false story: *i.e.*, a story that would both exonerate him from wrongdoing and simultaneously avoid inaccurate details that could betray the story as a whole by unnecessarily conflicting with aspects of the truthful accounts offered by other witnesses. That consideration was of course not dispositive to respondent's ultimate credibility as a witness, but it was at least a relevant factor for the jury to bear in mind.

2. The question presented here is thus whether, *despite* the relevance of this factor to respondent's credibility as a witness, the Sixth Amendment right of a criminal defendant "to be present in the courtroom at every stage" of trial, *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970), barred the prosecution from inviting the jury to consider that factor. If the subject of the prosecutor's remark had been any witness other than a criminal defendant, the Constitution plainly would have allowed it. When two witnesses tell mutually contradictory accounts of the same underlying events, and one witness has the advantage of listening to the details of the other witness's testimony before venturing his own, that advantage is obviously relevant to his credibility, and the jury therefore should be able to consider it.[4]

[4] It is common for counsel or the court to invite the jury to take a witness's violation of a sequestration order into account when considering the witness's credibility. See, *e.g.*, *Holder* v. *United States*, 150 U.S. 91, 92 (1893) (such a witness "may be proceeded against for contempt, and his testimony is open to comment to the

Respondent's essential position in this case, therefore, is that criminal defendants should be treated differently from other witnesses in this respect and shielded from relevant comments concerning their credibility *as witnesses*.

That position is inconsistent with the settled principle that when a defendant "takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness." *Brown* v. *United States*, 356 U.S. 148, 154 (1958). This Court has reaffirmed that principle in a variety of contexts over a span of more than a century.

In *Reagan* v. *United States*, 157 U.S. 301 (1895), the trial court had instructed the jury, after the defendant had taken the stand in his own defense, that "[t]he deep personal interest which he may have in the result of the suit should be considered * * * in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." *Id.* at 304. This Court upheld the conviction on the ground that, "if [a defendant] avail himself of this privilege [of testifying on his own behalf], his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness,

jury"); *United States* v. *Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (remedies for violation include "instructions to the jury that they may consider the violation toward the issue of credibility"), cert. denied, 522 U.S. 1098 (1998); 4 Jack B. Weinstein, et al., *Weinstein's Federal Evidence* § 615.07[2][c], at 615-30 to 615-31 (2d ed. 1999) (same). Such comment is appropriate not only (or even primarily) because it sanctions the party on whose behalf the witness has testified, but also because it identifies a relevant factor that any jury should consider in assessing the ease with which the witness might have fabricated testimony.

he is entitled to all its rights and protections, and is subject to all its criticisms and burdens." *Id.* at 305.[5]

Similarly, in *Raffel* v. *United States*, 271 U.S. 494 (1926), this Court held that a defendant who took the stand at his second trial after an initial mistrial could be cross-examined about his failure to testify at the first trial, even though it had by then become firmly established that in the federal system a prosecutor was barred from commenting on a defendant's silence (see 18 U.S.C. 3481; *Wilson* v. *United States*, 149 U.S. 60 (1893)). Relying on *Reagan*, the Court reasoned that,

[5] The recent trend in some jurisdictions has been to direct the use of more generic instructions about "interested witnesses" that do not specifically identify the defendant as such. See, *e.g.*, 1 Edward J. Devitt, Charles B. Blackmar, et al., *Federal Jury Practice & Instructions* § 15.01, at 465-466, § 15.12, at 528-531 (4th ed. 1992); *United States* v. *Dwyer*, 843 F.2d 60 (1st Cir. 1988); compare *United States* v. *Hill*, 470 F.2d 361, 364-365 (D.C. Cir. 1972) (approving instruction similar to the one at issue in *Reagan*, reasoning that "[i]f any witness has a special interest in the case it is within the sound discretion of the trial judge to call that interest to the specific attention of the jury"); Tr. 834 (instructing jury in this case that "[a] defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony."). But this Court has never questioned the continuing validity of *Reagan*, much less suggested that the instruction approved there (and employed, in various forms, in a number of state and federal courts) is unconstitutional. Significantly, even jurisdictions that favor "interested witness" instructions that do not specifically mention the defendant have reaffirmed that a *prosecutor* may nonetheless challenge a testifying defendant's credibility based on his "interest in the outcome of the trial." *McGrier* v. *United States*, 597 A.2d 36, 46 (D.C. 1991). Indeed, Judge Oakes himself acknowledged in his opinion below that the prosecutor was "free, of course, to point out" that respondent had a "motive to lie in order to escape incarceration." Pet. App. 46a-47a.

"[w]hen [a defendant] takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed." 271 U.S. at 497.[6]

More recently, in *Brown*, the Court held that when a defendant exercises his right to take the stand, "[h]e cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." 356 U.S. at 155-156. To the contrary, "his credibility may be impeached and his testimony assailed like that of any other witness," lest the Constitution become "a positive invitation to mutilate the truth." *Id.* at 154, 156.

The Court followed a similar rationale in *Harris* v. *New York*, 401 U.S. 222 (1971), in which it held that, when a defendant elects to become a witness, he may be cross-examined with any statements the police may have elicited from him in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court reasoned: "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional

[6] In his initial opinion below, Judge Oakes suggested that it is "unclear whether *Raffel* principles remain good law." Pet. App. 43a n.9. In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), however, this Court specifically reaffirmed the validity of *Raffel* and relied heavily upon it in holding that a testifying defendant may be impeached with evidence of prearrest silence. *Id.* at 235-237 & nn. 2, 4; see p. 17, *infra*.

truth-testing devices of the adversary process." 401 U.S. at 225.[7]

The Court revisited and reaffirmed this line of precedent in *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), in which it held that the Fifth Amendment does not bar the prosecution from using a defendant's prearrest silence to impeach his credibility once he takes the stand. Relying on *Raffel*, *Brown*, and *Harris*, the Court reasoned that "[o]nce a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id.* at 238 (quoting *Brown*, 356 U.S. at 156).

Finally, in *Perry*, this Court held that, even though the Sixth Amendment generally entitles a defendant to consult with counsel during trial, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." 488 U.S. at 281. The Court explained that cross-examination of any witness "is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties," a central premise of sequestration and "nondiscussion" orders. *Id.* at 281-282. Similarly, the Court concluded, "when [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve

[7] The Court has similarly held that a testifying defendant may be impeached by evidence seized in violation of the Fourth Amendment, *Walder* v. *United States*, 347 U.S. 62 (1954); by proof of prior convictions, see *Spencer* v. *Texas*, 385 U.S. 554, 561-562 (1967); and by co-defendant confessions that would otherwise be inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), see *Tennessee* v. *Street*, 471 U.S. 409 (1985).

the truth-seeking function of the trial—are generally applicable to him as well." *Id.* at 282.

These cases each affirm a central principle of law: when a defendant elects to testify, he may not invoke his status as a defendant to avoid fair scrutiny as a witness. Rather, his credibility will be subject to the same comment, the same cross-examination, and the same jury instructions that any nonparty witness would face in analogous circumstances. That principle controls this case.[8] Just as it would be fair comment to note that a nonparty witness may have used access to other witnesses' testimony to fabricate his own, see p. 13, *supra*, it was fair comment here for the prosecution to observe that respondent enjoyed a unique opportunity to tailor his testimony, so far as possible, to the facts established during the prosecution's case-in-chief. And, because the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *United States* v. *Robinson*, 485 U.S. 25, 33 (1988), it was fair comment that the jury was entitled to consider.

B. The "Penalty" Analysis of *Griffin* v. *California* Is Inapplicable To The Constitutional Question Presented Here

In its decision on rehearing, the majority below reasoned that, because the prosecutor had sought to "bolster[] * * * the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial," the "constitutional issue here is somewhat

[8] For that reason, there is no basis for the suggestion of Judges Oakes and Winter, in their initial opinions below (see Pet. App. 48a-49a, 69a), that the prosecutor's comments in this case unconstitutionally burdened respondent's right to testify in his own behalf.

similar to that in *Griffin* v. *California*, 380 U.S. 609, 613-615 (1965)." Pet. App. 72a-73a. That reasoning is unsound.

1. In *Griffin*, this Court held that the Fifth Amendment right against compelled self-incrimination bars the court and the prosecution from inviting the jury to draw an inference unfavorable to a defendant when he fails to testify in response to the State's case. Official comment on a defendant's refusal to testify, the Court held, "is a penalty imposed * * * for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Last Term this Court reaffirmed *Griffin*'s bar on drawing an adverse factual inference from a nontestifying defendant's exercise of his right to remain silent in a criminal proceeding. See *Mitchell* v. *United States*, 119 S. Ct. 1307 (1999). As the Court observed, the rule was originally deemed necessary because of concerns that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Id.* at 1315 (quoting *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956)).

Although the *Griffin* rule has now "become an essential feature of our legal tradition," 119 S. Ct. at 1316, the Court has declined invitations to extend that rule—or, more generally, *Griffin's* "penalty" analysis—beyond the context of official comment on a defendant's silence at a criminal proceeding, and sometimes it has declined to apply it even in that context. For example, the Court recognized that its holding in *Jenkins*, *supra*, could discourage a criminal suspect from exercising his right to remain silent before his arrest, since that silence could later be used to impeach him if he takes

the stand. The Court explained, however, that the "Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" 447 U.S. at 236 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973)). Similarly, in *Robinson*, the Court found *Griffin's* "penalty" analysis inapplicable where defense counsel had suggested that the government had precluded the defendant from explaining his side of the story and the prosecutor had then told the jury, in his rebuttal summation, that the defendant "could have taken the stand and explained it to you." 485 U.S. at 26. The Court acknowledged that the prosecutor's comment imposed "some 'cost' to the defendant in having remained silent," but it nonetheless "decline[d] to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one." *Id.* at 34.

Invocation of *Griffin*'s "penalty" analysis is even less appropriate here than it was in *Jenkins* and *Robinson*. Unlike those cases, this case does not even involve prosecutorial comment on a defendant's silence. Instead, it involves prosecutorial comment on the defendant's attendance at trial and his resulting unique familiarity with the testimony of other witnesses. For several reasons, such comment poses none of the concerns that gave rise to *Griffin*'s rule.

First, *Griffin* holds that a court or prosecutor may not ask the jury to infer that a defendant is guilty *because* he has exercised a particular constitutional right: the right to remain silent. Here, the prosecutor obviously did not ask the jury to infer that respondent was guilty *because* he attended trial. To the contrary, she asked the jury to bear in mind (as it might well have done in any event) that respondent's attendance

throughout trial, while completely unsuspicious in its own right, would nonetheless make it easier for him to tailor any fabricated testimony to the facts established during the prosecution's case-in-chief.

Put another way, whereas the *Griffin* rule originated in response to an empirical concern that jurors "too readily assume" that those who invoke the Fifth Amendment are for that very reason guilty, *Mitchell*, 119 S. Ct. at 1315, there is no analogous concern here. Few jurors would draw *any* connection, much less an exaggerated one, between a defendant's attendance at his own trial and the likelihood of his guilt. Indeed, the law in most jurisdictions compels a defendant's presence at trial (see, *e.g.*, Pet. App. 59a), and even if it did not, most jurors would understand that even innocent defendants would take a criminal trial seriously enough to attend.[9] For similar reasons, whereas prosecutorial

[9] The prosecutor observed not just that respondent was in fact present throughout trial, but that, as a normal "benefit" of being a defendant, he "*gets to* sit here and listen to the testimony of all the other witnesses before he testifies." J.A. 49 (emphasis added). Despite the district court's contrary view (Pet. App. 8a), there was nothing problematic about the suggestion that respondent had a right to be present in the courtroom. Indeed, if anything, that observation would tend to dispel any conceivable question about whether that presence itself was somehow improper or deserving of suspicion. And if respondent had thought that the jury might have inferred that he had elected to be present during the prosecution's case for an improper purpose, he could have sought a jury instruction that state law compelled his attendance at trial and that he had the opportunity to present his defense and testify only after the prosecution had presented its case and rested. Respondent requested no such instruction in response to the comments at issue. Cf. Tr. 3 (instructing jury, at beginning of trial: "After the People have concluded the calling of their witnesses and the introduction of any exhibits which are admissible into evidence, the defendant may offer evidence in his defense.").

comment on a defendant's refusal to testify puts pressure on defendants to surrender their right to remain silent, it is inconceivable that the prospect of comments like those at issue here could ever induce any defendant to remain absent from trial (even if he were legally free to do so).

Finally, the majority's reliance on *Griffin* overlooks the basic distinction, discussed above, between the defendant as defendant and the defendant as witness. The comment at issue in *Griffin* encouraged the jury to construe a nontestifying defendant's silence as substantive evidence of his guilt. In contrast, the comment at issue here asked the jury to consider a *testifying* defendant's familiarity with the testimony of other witnesses as a factor in assessing his credibility *as a witness*. See generally *Robinson*, 485 U.S. at 32-34; see also Tr. 827 (instructing jury on distinction between evidence and arguments of counsel). Because a testifying defendant's "credibility may be impeached and his testimony assailed like that of any other witness," *Brown*, 356 U.S. at 154, *Griffin* simply has no application to this case.[10]

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[10] The panel majority's opinion on rehearing attributed no significance to the fact that the prosecutor made the disputed "argument" during summation rather than on cross-examination. See Pet. App. 72a. To the extent that the majority thus abandoned Judge Oakes' prior emphasis on that factor as central to the constitutional analysis (see *id.* at 39a-40a, 46a), it was correct to jettison that factor. The prosecutor's comment in argument was not "evidence" in its own right but a common-sense observation about the structure of the trial, and she was as free to make it during summation as she would have been if the witness in question had been someone other than the defendant. See p. 13, *supra*; see also note 13, *infra*.

2. In its decision on rehearing, the panel majority "retreat[ed] from any language in [its] prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony." Pet. App. 72a. The majority sought to confine its *Griffin* analysis to cases in which the prosecution makes "not a factual argument based on the defendant's testimony in this particular case[,] but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." *Ibid.* That distinction is unworkable in practice and is in any event doctrinally unsound.

The majority's analysis would turn on the specificity of the factual elaboration that accompanies the prosecutor's observation that a defendant's presence at trial enables him to tailor his testimony to that of other witnesses. As an initial matter, that analysis would be highly indeterminate, as this case itself illustrates. The prosecutor here did not make the comments at issue in isolation or "generic[ally]" (Pet. App. 72a); she made them amid a lengthy factual exposition of reasons why the jury should ultimately find the complaining witnesses more credible than respondent. See J.A. 28-52; pp. 3-4, *supra*. The dissent below was thus correct in observing that "the prosecutor was not disinterestedly discussing 'a' defendant. She was challenging the testimony given by 'the' defendant in the instant case. * * * The issue in the case was credibility, and con-

scientious counsel could not avoid discussing it in their summations." Pet. App. 75a-76a.[11]

Moreover, even if the prosecutor's comments here were in some sense "generic," nothing in the Constitution bars the government from making fair generalizations at the close of trial. Indeed, the jury instruction that this Court approved in *Reagan*—which encouraged the jury to consider "[t]he deep personal interest" of any testifying defendant "in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit" (157 U.S. at 304)—was far more "generic," and potentially more unfavorable to any defendant, than the prosecutor's comments at issue here.[12]

Most fundamentally, the panel majority's proposed distinction between permissibly specific and impermissibly "generic" prosecutorial comments answers the wrong question. For the reasons discussed above, *Griffin*'s "penalty" analysis is conceptually inapposite to any comment on a defendant's presence at trial, whether specific or generic. That is not to say that official comment on a defendant's attendance at trial during the testimony of other witnesses is invariably permissible. The defense might object to such comment

[11] Further, as the dissent added, respondent's counsel had "argued to the jury that the prosecution witnesses had fabricated the allegations," and the prosecutor's comments "were addressed squarely to [respondent] and his counsel's open-the-door, invite-a-response argument." Pet. App. 76a.

[12] See also note 5, *supra*. "Generic" observations concerning the credibility of categories of witnesses are in fact very common in modern jury instructions. See 1 Devitt & Blackmar, *supra*, § 15.02 *et seq.* (discussing instructions drawing into question the credibility of, *inter alia*, informants, immunized witnesses, accomplices, drug or alcohol abusers, and convicted felons); *Hill*, 470 F.2d at 365 & n.10.

just as the defense could object to any other argument: *i.e.*, as an unfair, irrelevant, or arbitrary attack on a defendant.[13] If improper on those grounds, such comment might require reversal if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974).[14] But there is no doctrinal

[13] In his initial opinion (Pet. App. 68a), but not in his opinion on rehearing (*id.* at 71a-75a), Judge Winter expressed a separate concern about the fairness of the prosecutor's comment, stating that, "[u]nder New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements." He thus concluded that "[s]o long as New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred." *Id.* at 68a-69a. That argument is unsound. As an initial matter, the prosecutor's comments appeared in fact to constitute "a claim of recent fabrication." As Judge Van Graafeiland observed, respondent could have sought, but did not seek, to reopen the presentation of evidence for the limited purpose of rebutting the prosecutor's comments with any prior consistent statements he may have made. See *id.* at 65a. In any event, the proper response to Judge Winter's concern is to ensure that hearsay rules do not impair a defendant's constitutional right to introduce appropriate evidence in his defense, not to impose federal restrictions (which, under Judge Winter's analysis, would apparently vary with state law) on the proper scope of prosecutorial comment.

[14] That standard is considerably more difficult for a defendant to satisfy than the standard for errors impairing specific constitutional rights. See *Greer* v. *Miller*, 483 U.S. 756, 765 n.7 (1987). Because the prosecutorial comment at issue here was neither erroneous nor unfair, this Court need not address whether it "so infected the trial" as to justify vacating respondent's state conviction. See generally Pet. App. 52a-53a & n.20; see also Pet i (presenting only question of whether court of appeals erred in extending *Griffin*).

basis for challenging the type of comment that was made in this case on the theory that it unconstitutionally "burdens" or "penalizes" a defendant's right to attend trial, and the panel majority erred in approaching the case from that perspective.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1999

(2)

No. 98-1170

IN THE

Supreme Court of the United States

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

vs.

RAY AGARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Constitution forbid a prosecutor to mention to the jury the fact that the defendant has had the advantage of listening to the other witnesses testify before he testifies?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

Although the Constitution grants many protections to criminal defendants, it does not insulate them from the consequences of their choices. When defendant chose to testify, he opened himself to attacks on his credibility, including the

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

district attorney's commentary that he had the advantage of seeing every other witness's testimony. The Second Circuit's holding that the state cannot impose any "cost" on the exercise of constitutional rights improperly insulates defendant from the consequences of his actions by meddling with legitimate state practices. This is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant, Ray Agard, met Nessa Winder and Brenda Keegan at a Manhattan club on Friday, April 27, 1990. *Agard* v. *Portuondo*, 117 F. 3d 696, 698 (CA2 1997). Winder testified that after accompanying defendant to his residence that night, she and defendant engaged in oral and vaginal sex on the night of the 27th and the morning of the 28th, but she refused his request for anal intercourse. See *id.*, at 699. She also testified that although she slept at his place Saturday night, after an afternoon at the beach, she turned down his attempt to initiate sex as her boyfriend from London would soon be visiting. *Ibid.*

Defendant, his friend Freddy, Keegan, and Winder met again on Saturday, May 5, at the same club where they first met. See *ibid.* The group drank and talked for several hours. Some, including Winder, used cocaine. *Ibid.* Winder testified that she got drunk and passed out, last remembering the arrival of defendant's friend Kiah and the group's decision to go to another club. Keegan testified that Winder, although drunk, was "walking and talking" at the time of her memory failure. *Ibid.* The group left in Kiah's car, where they eventually moved to another bar and continued drinking. During the trip Winder was in defendant's lap, but was not affectionate, as she was sleeping. *Ibid.*

Between 4:00 and 4:30 a.m., they left the bar. Although Keegan wanted to return to her place with her roommate Winder, the group went to Agard's place at his suggestion. *Ibid.* Kiah and Freddy left for beer, while defendant let the two

women in, where they then went to defendant's bedroom. Winder immediately fell asleep on defendant's bed. After Keegan indicated that she wanted to call a cab, defendant responded that she should stay and have a beer, since he had his friends go to the trouble of getting some. He then became verbally abusive and threatening. *Ibid.* Eventually, he pulled a gun out of a drawer and placed it "against Keegan's head, saying, 'I'm going to give you three seconds to shut up.' " *Id.*, at 700. Defendant then put the gun away and continued to verbally abuse Keegan until his friends returned. Although reluctant to leave her roommate, Keegan decided to leave with Kiah. While leaving, she brushed by defendant, who grabbed her around the neck. Keegan screamed and defendant let go, "cursing her for getting him in trouble with his landlady." *Ibid.*

Winder testified that she woke up at 9:30 a.m., wearing nothing but her vest. She could not remember how she got where she was, but she knew she needed to get home to meet her boyfriend coming from England. *Ibid.* She recalled "that at some point [defendant] had asked her for 'a fuck' and she said 'no.' " *Ibid.* When she tried to call a cab, defendant put the phone down cursing both her and Keegan. *Ibid.* When she started to get dressed defendant hit her and eventually threatened her with a gun to force her to commit oral sodomy. *Ibid.*

Winder asked to be allowed to go to the bathroom, and defendant assented. *Ibid.* After first locking herself in the bathroom, she attempted to flee to Freddy's room, where she begged Freddy to help. She then brought Freddy with her into defendant's room. Defendant ordered Freddy out, and he complied. *Ibid.* Winder screamed in the hopes of getting the landlord's attention. Defendant then punched her three times in the face. *Id.*, at 700. Defendant next proceeded to commit several acts of rape, oral, and anal sodomy on Winder. See *id.*, at 700-701.

After defendant was through with her, he called a taxi to take her home. He escorted her downstairs, threatening her if she called the police. *Id.*, at 701. Because she had no money,

the cab dropped her off a short distance from defendant's place, where she managed to call Keegan. She hid until Keegan found her, and the two immediately went to the police station. *Ibid.* The medical exam showed no signs of abnormality in Winder's vagina or anus and only her vaginal sample was positive for spermatozoa. *Ibid.*

On the day after the rape, May 7, 1990, Winder and Keegan found the following message on their answering machine:

> "You will know who this message is for. After careful consideration of this entire situation, it was my fault. I was a golden asshole. The only thing I can do is say I'm sorry and that's it. I'll never bother you again. Live safely and peacefully. Goodbye." *Ibid.*

At trial, both Keegan and Winder identified the voice as defendant's.

Defendant claimed that he and Winder engaged in consensual anal intercourse with lubricants their first night together. *Id.*, at 701. He asserted that on the second weekend Winder was awake and amorous towards him during the drive to the second nightclub. He declared that while Keegan wanted to go home, Winder had no reservations about going to his place. *Ibid.* Defendant and Winder fell asleep next to each other on his bed at 6:00 a.m. When they awoke three hours later they engaged in consensual vaginal sex. He claimed they reawakened between noon and 1:00 p.m., with Winder " 'upset,' and 'kind of hyper,' and concerned that her boyfriend was going to kill her." *Ibid.* When he tried to calm her she struck him and scratched the inside of his mouth. See *id.*, at 701-702. He reflexively "used the palm of his open hand to push her away, 'mush[ing]' her in the eye." *Id.*, at 702. He called a cab and gave her $25 for fare. His call the next day was to apologize for mushing her in the face. *Ibid.*

Kiah testified for the defense that Winder hugged and kissed defendant during the drive to the second club and that she was conscious at the last bar, contrary to Keegan's testimony. He

also said that Keegan never informed him that defendant had threatened her with a gun. *Ibid.*

At the closing argument, the district attorney argued that defendant was " 'the one who had an answer for everything' " and that his story fit perfectly with the complaining witnesses except for "the denials of the crime." *Id.*, at 707. She then noted that "unlike all the other witnesses . . . he [defendant] gets to sit here and listen to the testimony of all the other witnesses before he testifies." *Ibid.* Defendant was convicted on one count of anal sodomy, of felony assault with rape as the underlying felony, and three weapons counts. *Id.*, at 702. The felony assault conviction was dismissed by the trial court as inconsistent with the rape acquittal. *Ibid.*

The state intermediate appellate court vacated one weapon count, while affirming the other convictions. *People* v. *Agard*, 606 N. Y. S. 2d 239, 240 (N.Y. App. Div. 1993). On March 21, 1996, the federal district court denied his habeas petition. *Agard* v. *Portuondo*, *supra*, 117 F. 3d, at 698. The Second Circuit reversed, *id.*, at 715, finding that the district attorney's reference to defendant's observation of all other testimony violated his right to confrontation, *id.*, at 709, to testify on his own behalf, *id.*, at 712, and the due process right to a fair trial. *Id.*, at 714.

SUMMARY OF ARGUMENT

The Due Process Clause is an inappropriate vehicle for analyzing the closing argument in the present case. Only egregiously improper closing arguments violate due process. Thus, the rule of *Griffin* v. *California* does not extend to due process. Since the present case turns on extending *Griffin*, the district attorney's remarks did not violate due process.

Before determining whether *Griffin* may be extended to other constitutional rights, it is first necessary to understand its basis in the Fifth Amendment's self-incrimination privilege. *Griffin*, relying on past practice, notes that testifying poses a

risk to the innocent defendant who has prior convictions, or who would be a poor witness. In situations where the Fifth Amendment is inapplicable, this Court accepts the relevance of inferring guilt from a failure to respond to an accusation. Because it is logical to infer guilt from a failure to testify, *Griffin* must be based on more than protecting innocents.

Griffin's Fifth Amendment rationale is found in the proscription against subjecting defendants to the "cruel trilemma" of contempt, perjury, or self-incrimination. The pressure from the inference of guilt is sufficiently close to contempt to make *Griffin* error a form of compelled self-incrimination. *Griffin*'s rationale thus primarily protects the guilty, as innocent defendants are not confronted with any "trilemma," as they can honestly testify to their innocence.

Defendant's Sixth Amendment right to physical confrontation, like all other confrontation rights, is intended to assure an accurate verdict. Each component of the Confrontation Clause is meant to help defendant test the accuracy and credibility of the state's witnesses. This right to confrontation is interpreted with an eye towards the needs of the trial it governs, thus discouraging impractical literalism and retaining flexibility so long as there is substantial compliance with its truth-finding function.

Defendant received as much confrontation as the Constitution requires. The People's witnesses testified under oath, in the presence of defendant and the jury, and were subject to unencumbered cross-examination. The district attorney's comments that defendant's presence at trial allowed him to tailor his testimony to what he heard did not diminish these rights, because the closing argument advanced the interests protected by the Confrontation Clause.

Sequestering witnesses is an ancient and universal practice that is essential to an accurate verdict. Keeping witnesses from hearing each other's testimony helps expose inconsistencies and prevents falsehoods. It is considered, after cross-examination, to be one of the best methods for detecting untrue testimony.

Because the Confrontation Clause prevents defendant from being sequestered, the closing argument in the present case represents a reasonable compromise between sequestration and confrontation. The district attorney's remarks to the jury were accurate: witnesses do tailor their testimony to what they have heard, and criminal defendants have greater means and motive to tailor than any other witnesses. The extensive testimony that differed on a few key details reinforced this risk in the present case. Giving this information to the jury allowed it to judge defendant's credibility in its proper context while preserving his basic right to confrontation. Because *Griffin* is based on considerations other than accuracy of the verdict, it does not apply to this truth-finding closing argument that is consistent with the goals of the Confrontation Clause.

Defendant's right to testify was not violated by the closing argument. This right is limited to preventing rules that arbitrarily limit defendant's testimony in a manner disproportionate to their goals. Defendant was not kept from testifying. The fact that his choice to testify exposed him to attacks on his credibility does not violate this right. A defendant who testifies is treated like any other witness and is subject to vigorous attacks on his credibility. Because the Constitution is not a license to commit perjury, attacks on defendant's credibility are given more leeway. Thus illegally seized evidence and custodial statements taken without *Miranda* warnings can be used to attack a testifying defendant's credibility. The Constitution does not insulate defendant from the adverse consequences of his decision to exercise a constitutional right. The district attorney's accurate assessment of defendant's credibility therefore neither prevented nor burdened his right to testify.

ARGUMENT

I. The People's closing argument did not violate due process.

Although the present case turns on whether the rule of *Griffin* v. *California*, 380 U. S. 609 (1965) applies to the Confrontation Clause or defendant's right to testify, it is first necessary to clear out some constitutional underbrush left by the Second Circuit's opinion. The Second Circuit's lead opinion held that, in addition to violating the Sixth Amendment, the district attorney's commentary on defendant's presence at trial also violated his due process right to a fair trial. See *Agard* v. *Portuondo*, 117 F. 3d 696, 712-714 (CA2 1997) (Oakes, J.). Because this opinion invoked the right to a fair trial, the limits on applying substantive due process to criminal procedure were not applicable. See *Albright* v. *Oliver*, 510 U. S. 266, 273, n. 6 (1994). The right to a fair trial does not, however, transform a reviewing court into a roving censor, parsing closing arguments for the smallest impropriety. The fundamental fairness standard of due process is an inappropriate vehicle for analyzing the argument in the present case.

Before it can violate due process, a closing argument's impropriety must be "egregious." *Donnelly* v. *De Christoforo*, 416 U. S. 637, 647-648 (1974). The most relevant example of the height of the due process hurdle that defendant must leap is *Griffin*'s predecessor, *Adamson* v. *California*, 332 U. S. 46 (1947). *Adamson* examined a California law allowing the trial court to instruct the jury that it could consider defendant's failure to testify against him. See *id.*, at 48. Because the Fifth Amendment did not then apply to the states, see *id.*, at 52-53, defendant had to make his attack under the due process right to a fair trial. *Id.*, at 53. Due process is not coextensive with the Fifth Amendment's self-incrimination right, see *id.*, at 54, but instead protected against a narrow set of particularly serious constitutional wrongs. Although due process prevented the "compulsion to testify by fear of hurt, torture or exhaustion" or "any other type of coercion," *ibid.*, due process did not prohibit

commentary upon defendant's decision not to testify. The state could require defendant "to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes" because "[t]he purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction." *Id.*, at 57.

Had this Court not applied the Fifth Amendment to the states in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), California's instruction would still be valid. The fairness of the California instruction was not questioned in *Griffin*. What mattered was the excessive burden it placed on the exercise of the Fifth Amendment privilege. See *Griffin*, *supra*, 380 U. S., at 614. Therefore, the inference from silence struck down in *Griffin* is still valid under due process. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976). If *Griffin* error does not violate due process, then fundamental fairness does not support *extending Griffin* beyond the self-incrimination privilege.

II. *Griffin* is a limited decision closely tied to the policies supporting the self-incrimination privilege.

Before determining whether *Griffin* v. *California*, 380 U. S. 609 (1965) should be expanded from the self-incrimination privilege to either the Confrontation Clause or the right to testify, it is important to understand the decision's rationale and its Fifth Amendment roots. An understanding of *Griffin*'s roots will reveal how far it may extend.

Griffin relies more on generalities than specifics for its initial justification. The decision first placed heavy reliance upon past practice. It noted the strong majority rule against commenting on defendant's decision not to testify. *Id.*, at 611, n. 3. It also found much support for its Fifth Amendment interpretation from *Wilson* v. *United States*, 149 U. S. 60 (1893). *Griffin*, 380 U. S., at 612. *Wilson* interpreted the statute granting criminal defendants competency to testify, the predecessor to 18 U. S. C. § 3481, as prohibiting commentary

on defendant's exercise of the right to silence at trial. See *Wilson*, 149 U. S., at 65. The *Griffin* Court quotes extensively from a well-known passage in *Wilson* which pointed out the dangers testifying posed to the innocent defendant.

> ". . . the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." *Griffin*, *supra*, 380 U. S., at 613 (quoting *Wilson*, *supra*, 149 U. S., at 66).

By simply substituting "Fifth Amendment" for "act" and "statute," *Griffin* established its self-incrimination foundation. See *id.*, at 613-614. Comment on the exercise of the privilege was thus " 'inquisitorial,' " see *id.*, at 614 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964)), as it imposed too high a cost on the exercise of the privilege. See *ibid.* These passages only begin the inquiry. A careful examination of the Fifth Amendment and cases applying *Griffin* reveal the decision's meaning.

As this Court subsequently demonstrated, *Griffin* does not forbid any "cost" from being imposed upon the Fifth Amendment privilege. *Baxter* v. *Palmigiano*, 425 U. S. 308, 312

(1976) involved a prison disciplinary hearing in which the prisoner's silence would be held against him. Even though this practice placed at least some cost on the prisoner's exercise of his Fifth Amendment privilege, this Court refused to extend *Griffin*. *Id.*, at 319.

The fundamental differences between a prison disciplinary hearing and a criminal prosecution were key to the decision not to extend *Griffin*. *Ibid.* As the Court noted, *Griffin*'s Fifth Amendment protection did not extend to civil cases, where adverse inferences may be drawn against parties that do not testify. *Id.*, at 318. Because prison discipline involved interests other than the prosecution of criminals, this Court "decline[d] to extend the *Griffin* rule to this context," *id.*, at 319, demonstrating that *Griffin* is inextricably tied to the policies of the self-incrimination privilege.

> "It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. *It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions.* Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Ibid.* (emphasis added).

Baxter provides the first key to a proper understanding of *Griffin*; the decision only extends to where its Fifth Amendment policies are served. Unfortunately, the *Griffin* decision did not go into great detail when explaining the Fifth Amendment policies behind the decision. Although it demonstrated how a hypothetical innocent defendant may have good reasons not to testify, see *supra*, at 10, this could not form a strong basis for that decision, as it flies in the face of this Court's consistent recognition of the relevance of silence in the face of accusation. See *Baxter*, *supra*, 425 U. S., at 319; see also *United States* v. *Hale*, 422 U. S. 171, 176 (1975); *Adamson* v. *California*, 332 U. S. 46, 56 (1947); *Raffel* v. *United States*, 271 U. S. 494, 499

(1926). Therefore, some other Fifth Amendment policy must form the basis of the *Griffin* rule.

Because the self-incrimination privilege applies to so many different situations, and because its history is uncertain, the privilege has no single policy. See 8 J. Wigmore, Evidence § 2251, pp. 295-297 (McNaughton rev. 1961). Instead, up to a dozen policies have been asserted to justify it. See *id.*, at 297-310, n. 2. This Court's most extensive examination of self-incrimination policy is found in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964) (citations and internal quotation marks omitted), overruled on other grounds in *United States* v. *Balsys*, 141 L. Ed. 2d 575, 599, 118 S. Ct. 2218, 2230 (1998).

> "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent."

Griffin attacks the California instruction as "inquisitorial." This term, however, is no more than a label. Cf. 8 Wigmore, *supra*, § 2251, at 312, n. 5 (dismissing argument that the privilege prevents procedures such as those associated with the Star Chamber or Inquisition as "platitudes"). What matters is why that label sticks.

The policy most closely supporting *Griffin* is *Murphy*'s "cruel trilemma." Allowing the trial court or prosecutor to tell the jury to infer guilt from silence is a form of "unconstitutional compulsion." *Lakeside* v. *Oregon*, 435 U. S. 333, 339 (1978). Thus, in *Griffin*, *Murphy*'s third prong of contempt was replaced with the state's "free[dom] to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand." See *ibid.* While *Griffin* does no doubt protect the innocent defendant by removing the risk that he is a poor witness or could be impeached with prior convictions, see *Griffin*, *supra*, 380 U. S., at 614-615, it primarily shields guilty defendants from this special variant of *Murphy*'s "cruel trilemma." This is, of course, a protection that only benefits the guilty. The innocent defendant has no "trilemma," as he may testify without incriminating or perjuring himself. Therefore, "[t]his 'trilemma' is wholly of the guilty suspect's own making of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a 'lemma')." *Brogan* v. *United States*, 522 U. S. 398, 404 (1998) (citation omitted).

Griffin's basis in compulsion is also found in one of the rare cases extending *Griffin*, *Brooks* v. *Tennessee*, 406 U. S. 605 (1972). *Brooks* invoked *Griffin* to overturn a Tennessee rule requiring defendant to testify first if at all. See *id.*, at 610-612. What made the Fifth Amendment privilege " 'costly' " in this case, *id.*, at 611 (quoting *Griffin*, 380 U. S., at 614), was the compulsion inherent in requiring him to testify so early in the trial. "*Pressuring* the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.*, at 611 (emphasis added).

The statement in *Carter* v. *Kentucky*, 450 U. S. 288, 301 (1981) that "[t]he *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify" must be read in this context. The "price" condemned in *Carter* is only extracted through *Griffin*'s unique trilemma. In other circumstances,

defendants must bear the costs associated with being required to make difficult choices concerning the exercise of their rights. "The cases in this Court since [*United States* v. *Jackson*, 390 U. S. 570 (1968)] have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt* v. *New Jersey*, 439 U. S. 212, 218 (1978).

In *Crampton* v. *Ohio*, 402 U. S. 183, 210-211 (1971),[2] defendant challenged Ohio's unitary trial, where the jury determined both guilt and punishment in a single verdict. Defendant attacked this under *Griffin* because he could remain silent on the issue of guilt only at the price of losing any chance to plead his case on the issue of punishment. *Ibid.* The Court upheld this burden on the self-incrimination privilege. *Id.*, at 217.

> "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.*, at 213 (internal quotation marks and citation omitted).

Griffin is a narrow ruling based on the close similarity between the pressure to testify from inferring guilt from silence and the pressure exerted by the threat of contempt. It is even narrower within the confines of a prosecutor's commentary on defendant's silence. In *United States* v. *Robinson*, 485 U. S. 25, 26 (1988), defense counsel's closing argument asserted that the state had not allowed defendant to tell his side of the story. The prosecutor responded by arguing that defendant could have taken the stand. *Ibid.* This Court declined to extend *Griffin*,

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2. *Crampton* was decided with *McGautha* v. *California*, 402 U. S. 183 (1971), after *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court granted rehearing and vacated on other grounds. See *Crampton* v. *Ohio*, 408 U. S. 941 (1970).

noting that its statement that the self-incrimination privilege "forbids . . . comment by the prosecution on the accused's silence," *Griffin*, *supra*, 380 U. S., at 615, was merely "broad dicta . . . that must be taken in light of the facts of that case." *Robinson*, *supra*, 485 U. S., at 33-34. Even though, as in *Griffin*, "[t]here may be some 'cost' to the defendant in having remained silent" this was not enough to extend *Griffin*'s narrow rule. *Id.*, at 34.

When the Second Circuit chose to extend *Griffin* to the Confrontation Clause and the right to testify, it was building upon a very narrow base. As shall be seen, *Griffin* cannot support this edifice.

III. The Confrontation Clause's basis in the accuracy of the fact-finding process does not support an extension of *Griffin*.

The primary constitutional issue raised by the district attorney's closing argument is its effect on defendant's Sixth Amendment right to confrontation. Although most Confrontation Clause decisions are concerned with hearsay testimony or limits on cross-examination, the clause also preserves defendant's physical confrontation with the state's witnesses. *Coy* v. *Iowa*, 487 U. S. 1012, 1016 (1988). Like the cross-examination and hearsay components of the clause, the right to physical confrontation is primarily concerned with aiding the accuracy of the fact-finding process. Because the risk that defendant tailored his testimony after hearing the other witnesses' testimony was substantial, the district attorney's argument in the present case enhanced the accuracy of the verdict, and thus satisfied the Confrontation Clause.

A. Confrontation and the Truth.

Unlike the hydra-headed rationales for the Fifth Amendment's self-incrimination privilege, the Confrontation Clause's purpose is singular. Whether it regulates hearsay, cross-

examination, or physical confrontation, the clause has but one goal:

> "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland* v. *Craig*, 497 U. S. 836, 845 (1990).

Physical confrontation between defendant and the witness advances this goal because it is more difficult to falsely accuse someone to that person's face. "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.' " *Coy*, *supra*, 487 U. S., at 1019 (internal quotation marks omitted). Thus, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " *Ibid.*; see also *Ohio* v. *Roberts*, 448 U. S. 56, 63, n. 6 (1980); 3 W. Blackstone, Commentaries 373 (1st ed. 1768). Public perception of the need for physical confrontation comports with reality, which explains physical confrontation's importance in maintaining both the perception and the reality of a fair criminal trial. See *Coy*, 487 U. S., at 1018-1019.

While physical confrontation is at " 'the core of the values furthered by the Confrontation Clause,' " *Craig*, *supra*, 497 U. S., at 847 (quoting *California* v. *Green*, 399 U. S. 149, 157 (1970)), this Court has "nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Ibid.* Instead, cross-examination, the oath, and demeanor give "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement.' " *Roberts*, *supra*, 448 U. S., at 69 (quoting *Green*, 399 U. S., at 166); accord *Craig*, 497 U. S., at 847. Therefore confrontation "is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities

through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware* v. *Fensterer*, 474 U. S. 15, 22 (1985) (*per curiam*).

The Sixth Amendment is a trial right which "must also be interpreted in the context of the necessities of trial and the adversary process." *Craig*, *supra*, 497 U. S., at 850. Literal compliance with the words of the Confrontation Clause is thus avoided as impractical. The clearest example is hearsay testimony; a literalist view of the right to confrontation would forbid any hearsay from being admitted against the accused, an unacceptable outcome. See *Roberts*, *supra*, 448 U. S., at 63. Instead, this Court steers "a middle course among proposed alternatives" for interpreting the Confrontation Clause. *Id.*, at 68, n. 9. Absolutism is similarly absent from face-to-face confrontation. "We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Craig*, 497 U. S., at 844 (emphasis in original).

Therefore, this Court has "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." *Id.*, at 847 (emphasis in original). Hearsay statements can be admitted against defendant if they have "sufficient 'indicia of reliability' . . . ." *Mancusi* v. *Stubbs*, 408 U. S. 204, 216 (1972) (quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970)). The less important physical confrontation with the testifying witness is subject to the same limitations. This right can be dispensed with when it "is necessary to further an important public policy and only where the reliability

of the testimony is otherwise assured." *Craig*, 497 U. S., at 850.[3]

Although the *Craig* Court notes that the confrontation right is not "easily . . . dispensed with," *id.*, at 850, the district attorney's argument in the present case is far from the total denial of physical confrontation at issue in *Craig*. As the next section demonstrates, the People's argument did not burden this least important confrontation right, and it actually advanced the Confrontation Clause's goal of aiding the accuracy of the verdict.

B. The Right Choice.

1. Choice and accuracy.

Before analyzing the effect of the district attorney's closing argument on defendant's right to confrontation, it is important to note how much confrontation defendant received. A typical Confrontation Clause case involves the total denial of at least some part of confrontation. See, *e.g.*, *Craig*, *supra*, 497 U. S., at 840 (child witness in child abuse case testifying outside defendant's physical presence over one-way, closed circuit television); *White* v. *Illinois*, 502 U. S. 346, 348-349 (1992) (spontaneous declaration and medical examination exceptions to hearsay rule). By contrast, the present case involved no deprivation of any of defendant's opportunities to confront the witnesses against him. The adverse witnesses testified under oath, in the presence of defendant and the jury, and were subject to cross-examination. The district attorney's comment that

3. This stands in sharp contrast to the immutable Fifth Amendment self-incrimination privilege. No policy justifies compelled self-incrimination. The government thus cannot use the threat of contempt to force out self-incriminating testimony without first granting immunity to the witness. See *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972). Such evidence is inadmissible even when the integrity of the fact-finding process is threatened; compelled statements are inadmissible at trial to impeach defendant's contrary testimony. *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978). Under the Fifth Amendment, the only issue is whether the privilege applies, once there is compelled self-incrimination no policy overrides its exclusionary rule.

defendant's presence at trial allowed him to tailor his testimony is no burden on his fully exercised confrontation rights.

While the complete elimination of some aspect of confrontation may only be justified when "necessary to further an important public policy," *Craig*, *supra*, 497 U. S., at 850, the mere indirect burden in the present case warrants less demanding justification. Defendant only bears this cost if he chooses to testify.[4] Just as *Griffin* v. *California*, 380 U. S. 609 (1965) does not insulate a defendant from making choices, see *supra*, at 13-14, neither does the Sixth Amendment insulate defendant from the consequences of his decisions.

In *United States* v. *Nobles*, 422 U. S. 225, 228-229 (1975), the District Court conditioned the admissibility of impeachment testimony by a defense witness on the production of an investigative report prepared by the witness, a defense investigator. When counsel declined to produce the report, the District Court ruled that the investigator could not testify about the items contained in the report, namely interviews with prosecution witnesses. Defendant attacked this under Sixth Amendment's confrontation and compulsory process rights, which this Court concluded, "misconceives the issue." *Id.* at 241. Defendant was not prevented from presenting his witness or impeaching prosecution witnesses. The District Court "merely prevented respondent from presenting to the jury a partial view of the credibility issue . . . ." *Ibid.* As this Court concluded: "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Ibid.*

As the Confrontation Clause is intended to help find the truth, any burden on defendant's confrontation that gives accurate information to the jury is a "legitimate demand[] of the adversarial system . . . ." *Ibid. Nobles* demonstrates that if the

4. The burden on defendant's right to testify is addressed in Part IV, *infra*.

district attorney's remarks were correct, then defendant's confrontation right was not violated.

2. Finding the truth.

The district attorney's closing argument reflects a truth with roots far older than the common law. The idea that witnesses should be separated to prevent their testimony from being tailored to each other's has ancient roots. See 6 J. Wigmore, Evidence § 1837, p. 455 (Chadbourn rev. 1976). By keeping the witnesses from hearing each other's testimony, inconsistencies in their stories can be detected, thus exposing falsehoods. *Ibid.* The common law courts were quick to understand this, and witness sequestration started even before the development of the jury trial in the fifteenth century. See *id.*, at 456-457. This practice crossed the Atlantic with our common law heritage, and is now the universal rule, whether by statute, or through the inherent power of the trial court. See *id.*, at 457-458, and 1998 Supp., p. 727; see, *e.g.*, Fed. Rule Evid. 615. "[S]equestration consists merely in preventing one prospective witness from being taught by another's testimony." 6 Wigmore, *supra*, § 1838, at 461.

The cost of failing to sequester the witness varies with the type of testimony he or she heard. A prospective witness who heard testimony of the opposing side "could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." *Ibid.* Preventing this will thus inhibit false testimony. See *ibid.* The separation of witnesses from the same side achieves even more: the detection of false testimony. If witnesses of the same side cannot keep the details of their stories consistent, then at least one witness on that side must be either lying or mistaken; by contrast, if witnesses from opposing sides contradict each other then the jury must go through "the troublesome uncertainty" of having to weigh the credibility of the opposing witnesses. See *id.*, at 462.

Sequestration is not perfect; allowances must be made for honest mistakes, and it may not catch sufficiently well-planned perjury. Nonetheless, sequestration is a powerful tool to help the jury find the truth.

> "But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it." *Id.*, at 463.

Unfortunately, the witness with the greatest incentive to tailor testimony, the criminal defendant, is the one witness who cannot be sequestered. See *Geders* v. *United States*, 425 U. S. 80, 88 (1976). In *Geders*, defendant was prevented from talking with counsel during an overnight recess which had been called just as he was to be cross-examined. *Id.*, at 82. This Court appreciated the substantial interests served by sequestration, see *id.*, at 87, but this mini-sequestration did not serve that interest well because defendant's right to attend the trial gave him ample opportunity to tailor his testimony. See *id.*, at 88. Given the substantial hardship to defendant from the trial court's order, this Court held that some lesser means should be used to deal with coaching. Among the possibilities were skillful cross-examination, which might develop a record for counsel to exploit during closing argument. *Id.*, at 89-90.

The closing argument in the present case represents this type of reasonable accommodation. The threat of tailoring is a fact: witnesses can and do tailor testimony, if given the opportunity. Since defendant has so much at stake, and is entitled to be the last witness to testify, see *Brooks* v. *Tennessee*, 406 U. S. 605, 611-612 (1972), the criminal defendant is by far the most likely

witness to tailor testimony. When the district attorney informed the jury of defendant's opportunity to tailor his testimony, she simply provided the jury with the wisdom of the law's centuries of experience.

The Second Circuit's contention that the district attorney first should have developed some factual basis for the remark, see *Agard* v. *Portuondo*, 117 F. 3d 696, 711 (CA2 1997) (Oakes, J.), is without merit. Just as the district attorney may be free to make the common-sense argument that defendant has a motive to lie in order to escape incarceration, see *ibid.*, she may also explain how defendant's story fits so neatly with so much of the victim's story, except for their accounts of the crimes. Common sense and experience show that the defendant had both the means and motive to fit his story to the victim's where it suited his interest.[5]

The closing argument must be analyzed in its context. See *Donnelly* v. *De Christoforo*, 416 U. S. 637, 645 (1974). This is a case involving extensive and detailed testimony by two sets of witnesses that differ only on a few critical facts. See *Agard*, *supra*, 117 F.3d, at 698. The remarks were not an attempt to imply guilt from defendant's mere presence at trial, see *id.*, at 709, but an attempt to educate the jury about the credibility of defendant's agreement with the complaining witnesses on so many details. See *People* v. *Buckey*, 378 N. W. 2d 432, 438 (Mich. 1985) ("[a]ny resulting inference was not directly of guilt, but rather that defendants had the opportunity to conform their testimony because they heard other witnesses testify"). This Court does not lightly infer that the prosecutor meant the most unfair or damaging inference from a remark, or that the jury will even draw such a conclusion. See *Donnelly*, 416 U. S., at 647. The district attorney's remarks are most reasonably seen as an appropriate, common-sense comment on defendant's credibility as a witness, a position held by several states. See,

5. Thus, the district attorney also could have noted the even more important point that defendant could tailor his testimony to that of his *supporting* witness, his friend Kiah.

e.g., *Buckey*, 378 N. W. 2d, at 438; *State* v. *Grilli*, 369 N. W. 2d 35, 37 (Minn. App. 1985); *State* v. *Hoxsie*, 677 P. 2d 620, 622 (N.M. 1984); *Reed* v. *State*, 633 S. W. 2d 664, 666 (Tex. App. 1982); *State* v. *Howard*, 323 N. W. 2d 872, 874 (S.D. 1982); *State* v. *Robinson*, 384 A. 2d 569, 570 (N.J. App. 1978) (*per curiam*).

Since the right to confrontation aims to ensure an accurate verdict, any burden arising from the remarks is incidental, as the remarks *helped* the jury assess defendant's credibility. *Griffin*, based in Fifth Amendment principles unconnected with the truthfulness of testimony, see *supra*, at 13, cannot make the journey to the truth-based Confrontation Clause.

IV. Attacking defendant's credibility as a witness does not violate the right to testify.

The Second Circuit is correct in pointing out that defendant does have a constitutional right to testify on his own behalf. See *Agard* v. *Portuondo*, 117 F. 3d 696, 712 (CA2 1997). This Court has held that defendant has the implicit right to testify in the Sixth Amendment's compulsory process clause, due process, and the Fifth Amendment's self-incrimination privilege. *Rock* v. *Arkansas*, 483 U. S. 44, 51-53 (1987); *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). The Second Circuit's holding that the closing argument violated this right by burdening it in a manner analogous to *Griffin* v. *California*, 380 U. S. 609 (1965), see *Agard*, 117 F. 3d, at 712, exceeds the boundary of a very narrow right. Defendant does not possess an unconditional right to testify free of either constraints or consequences. Accurate commentary about his credibility as a witness is the price defendant must expect to pay if he chooses to exercise his right to testify.

Rock, the genesis of this right, involved a total ban on hypnotically refreshed testimony. 483 U. S., at 45. Because defendant could not remember the details of the day she shot her husband, her counsel had her hypnotized in order to refresh

her testimony. *Id.*, at 46. The trial court's order limited her testimony "to 'matters remembered and stated to the examiner prior to being placed under hypnosis.' " *Id.*, at 47.

Rock did not ban all limits on hypnotically refreshed testimony. It turned on the arbitrariness of the state rule. "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but *arbitrarily* excludes material portions of his testimony." *Id.*, at 55 (emphasis added).

Rock, by limiting its reach to arbitrary restrictions on defendant's testimony, recognized that "the right to present relevant testimony is not without limitation." *Ibid.* It noted that "[n]umerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." *Id.*, at 55, n. 11. Restrictions on defendant's testimony were permissible so long as they were not only "arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, at 56.

The Arkansas rule virtually prevented defendant from testifying to the key events surrounding the shooting, despite the fact that her story was corroborated by other witnesses. *Id.*, at 57. The Court also felt that in some individual cases, hypnotically refreshed testimony might be reliable if proper procedural safeguards were in place. See *id.*, at 60-61. Arkansas' *per se* exclusion was thus arbitrary and disproportionate. See *id.*, at 61.

The closing argument in the present case is far removed from the arbitrary, near-total exclusion struck down in *Rock*. The greatest difference is, of course, that the district attorney's attack on defendant's credibility did not prevent him from testifying. Although he could not predict the content of his opponent's closing argument before choosing to testify, defendant was on notice that his credibility could and probably would be attacked. "[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the

truth-finding function of the criminal trial." *Jenkins* v. *Anderson*, 447 U. S. 231, 238 (1980). Once defendant takes the stand, he must be treated like any other witness. *Raffel* v. *United States*, 271 U. S. 494, 497 (1926); see also *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957). Defendant can even expect to be impeached with evidence that the Constitution forbids the state from using in its case in chief. Statements taken contrary to the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) can be used to impeach defendant, *Harris* v. *New York*, 401 U. S. 222, 226 (1971), as can evidence taken in violation of the Fourth Amendment. *Walder* v. *United States*, 347 U. S. 62, 65 (1954). Although such evidence is inadmissible in the state's case in chief, this Court understands that the Constitution does not grant defendant a license to commit perjury. See *Harris*, 401 U. S., at 226. Even if testifying carries the serious risk of cross-examination and impeachment, an enlightened criminal justice system can require defendant to make this choice. See *Brooks* v. *Tennessee*, 406 U. S. 605, 609 (1972).

When assessing whether a constitutional right has been unduly burdened "it also is appropriate to consider the legitimacy of the challenged governmental practice." *Jenkins*, *supra*, 447 U. S., at 238. The People's closing argument pointed out to the jury the problems associated with the constitutionally compelled decision to not sequester defendant. See Part III B, *supra*. It did not infer guilt from his presence, but simply gave the jury an accurate assessment of defendant's credibility, which serves the very important interest of helping the jury reach an accurate verdict. See *ibid.*

In *Jenkins*, this Court upheld impeaching defendant with his pre-arrest silence. 447 U. S., at 238-239. *Griffin* did not apply because, unlike *Griffin*, defendant chose to testify. *Griffin* is even further removed from the present case. In *Jenkins*, defendant's silence was used against him. Here, the Second Circuit extended *Griffin* to an entirely different right, the right to testify, in a case where defendant was allowed to give a full, detailed rendition of his side of the case. A handful of accurate comments concerning defendant's credibility did not make this

testimony vanish. It only placed the testimony in its proper context. The right to testify is not infringed when defendant " 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *Rock*, *supra*, 483 U. S., at 56, n. 11 (quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973)). Fair commentary on the evidence satisfies *Rock*'s standard.

Ultimately, the district attorney's legitimate commentary on the risks associated with defendant's testimony did not burden the right to testify because it was his decision to testify. In *United States* v. *Dunnigan*, *supra*, 507 U. S., at 96, this Court held that a sentence enhancement for defendant's perjury as a witness at her own trial did not impermissibly burden her right to testify. Making her testimony potentially riskier was of no constitutional significance. "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *Ibid.* Defendant has made his choice, he must now be left to live with it.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed.

June, 1999

Respectfully submitted,

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Criminal Justice Legal Foundation

(5)

No. 98-1170

In The

Supreme Court of the United States

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

v.

RAY AGARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICUS CURIAE* FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. A corollary to the Fifth Amendment protection against compelled testimony (and aspects of the Sixth and Fourteenth Amendments) is the right to be present at trial. A defendant who is both present at trial and chooses to testify has been protected by the derivative right and has waived the Constitutional right. Should the holding of *Griffin v. California* be expanded to prohibit comment on a testifying defendant's credibility when the underlying Constitutional mandates have been fulfilled?

2. *Griffin v. California* held that the jury could not infer guilt from a defendant's invocation of his right to remain silent. Once respondent testified he waived *Griffin's* protection but the lower court transposed the reasoning of *Griffin* to a Sixth Amendment claim to preclude comment on respondent's credibility as exposed by his choice of when to testify. Should the lower court's alchemy be ratified when the concerns underlying *Griffin* no longer exist?

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INTEREST OF AMICUS CURIAE[1]

The New York State District Attorneys Association is a statewide organization consisting of the elected District Attorneys of all 62 New York State counties, as well as Assistant District Attorneys from most, if not all, of those counties. Its total membership is approximately 1,000. The Association has obtained the consent of the parties to appear as *amicus curiae* in this proceeding because of the presence of a question of law which is of great importance to prosecutors throughout this State. The issue is whether the State trial prosecutor's summation comment that defendant had an advantage at trial because he heard other witnesses before testifying constituted a prejudicial violation of defendant's Fifth and Sixth Amendment rights. Six State court judges and the district court judge who denied Agard's petition for a writ of habeas corpus found no prejudicial error; following rehearing, the United States Court of Appeals for the Second Circuit held that, in the absence of a factual showing that defendant tailored his testimony, reference to defendant's presence during trial and the resulting opportunity to tailor his testimony required vacatur of his State court conviction. *Agard v. Portuondo*, 159 F.3d 98 (2nd Cir. 1998).

The Association sought to appear as *amicus curiae* in this appeal because this Court's decision concerning the challenged practice will have significant impact on State prosecutors.

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[1] No entity other than members of *amicus*, New York State District Attorneys Association, contributed to the preparation or submission of this brief, which was authored by Suffolk County Assistant District Attorneys Steven A. Hovani and Michael J. Miller.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V – Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI – Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF ARGUMENT

The New York State District Attorneys Association maintains that the decision of the Circuit Court is wrong because of its unwarranted reliance on the holding and reasoning of *Griffin v. California*, 380 U.S. 609 (1965). The Circuit Court both relied on the holding of *Griffin* to find a Fifth Amendment violation and the reasoning of *Griffin* to find a Sixth Amendment violation. Specifically, the lower court held that the prosecutor's reference to defendant's credibility unduly burdened his right to testify on his own behalf and his right to confront the witnesses against him.

Griffin, however, prohibited inferring guilt from silence. This concern is not present here because defendant testified and the prosecutor's comments did not ask the jury to find defendant guilty because of the timing of his testimony. Rather, the prosecutor only asked the jury to assess defendant's credibility in light of his trial tactics. Furthermore, the allegedly erroneous remarks were both fair comment on the evidence and a fair response to issues raised in defendant's summation.

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT ERRONEOUSLY EXPANDS THE PROTECTION OF THE FIFTH AND SIXTH AMENDMENTS.

Notwithstanding the narrow scope of federal habeas review of state convictions, in *Agard v. Portuondo*, 117 F.3d 696 (2nd Cir. 1997), *reh.*, 159 F.3d 98 (2nd Cir. 1998), the Second Circuit vacated respondent's conviction based on

what is arguably a new rule; it became the first federal court[2] to conclude that a prosecutor's summation suggestion that the jury consider defendant's presence in the courtroom throughout the trial, and his resultant unique opportunity to tailor his testimony to that of other witnesses, impermissibly burdens the exercise of Fifth and Sixth Amendment rights and deprives the defendant of a fair trial. The court erred because the challenged comments, which proposed a reasonable, permissive inference to the triers of fact, were appropriate. In the alternative, the remarks constituted a permissible response to defense counsel's summation and did not violate Agard's constitutional rights. We ask this Court to reverse and to reinstate respondent's convictions.

I.

THE HOLDING AND REASONING OF *GRIFFIN V. CALIFORNIA* SHOULD NOT BE EXPANDED TO PROHIBIT COMMENT ON THE CREDIBILITY OF A DEFENDANT WHO HAS TESTIFIED.

The New York State District Attorneys Association is concerned that the decisions in *Agard v. Portuondo*, 117 F.3d 696 (2nd Cir. 1997) (*Agard I*) and *Agard v. Portuondo*, 159 F.3d 98 (2nd Cir. 1997) (*Agard II*) unwisely and wrongly expand the holding of *Griffin v. California*, 380

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[2] As the Second Circuit noted, the highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that prosecutorial commentary on a defendant's presence during the testimony of other witnesses is improper. On the other hand, the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas, which addressed similar remarks, did not find error.

U.S. 609 (1965). Too, the Second Circuit has taken another step down the slippery slope to the complete federalization of State criminal law. We maintain that both *Agard I* and *Agard II* incorrectly interpret the United States Constitution. In *Agard I* the court followed the reasoning in *Griffin* to hold that the defendant's Sixth Amendment right to confrontation was violated when the prosecutor questioned the defendant's credibility by noting the sequence of the trial testimony. *Agard I*, at 709-12. In *Agard II* the court refined *Agard I* but adhered to the formula that the reasoning from *Griffin* controlled the outcome of this case. The court also held that the reasoning of *Griffin* led to the conclusion that the prosecutor's comments about the defendant's credibility had a chilling effect on the defendant's implicit Fifth Amendment right to testify on his own behalf. *Agard I*, at 712.

By opting to testify, however, respondent waived the protection of Fifth Amendment, which in any event does not apply to credibility issues. More importantly there is no basis to import the *Griffin* reasoning to a claim that the defendant's right to testify on his own behalf was unduly burdened. Since the Fifth Amendment and *Griffin v. California* infect the *Agard I* and *Agard II* Sixth Amendment analysis, the sequence of discourse will be inverted from the one used in *Agard I*; that is, we will discuss the implied Fifth Amendment right to testify before assessing *Griffin's* impact on the Sixth Amendment claim.

The core protection of the Fifth Amendment was waived by defendant. In pertinent part the Fifth Amendment reads that, "nor shall (any person) be compelled in any criminal case to be a witness against, himself, nor be deprived of life, liberty, or property, without due process

of law." The Fifth Amendment prohibits compelled testimony, which, with regard to criminal defendants, simply means that they cannot be forced to become a witness at their own trial. *South Dakota v. Neville*, 459 U.S. 553 (1983). Furthermore, an utterance is coerced only to the extent that it is offered to establish criminal liability. *United States v. Appelbaum*, 445 U.S. 115 (1980); *United States v. Mandujano*, 425 U.S. 564 (1976).

Thus, the Fifth Amendment privilege relates to factual assertions and information disclosed through testimonial utterances or conduct. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). The Fifth Amendment privilege against self-incrimination is waived when the defendant decides to take the stand and testify. *Brooks v. Tennessee*, 406 U.S. 605 (1972). The essence of the Fifth Amendment is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 18 (1964). Here, defendant fully waived the core protection of the Fifth Amendment right to remain silent. He affirmatively decided to testify at his trial and there is no contention that his decision was burdened by any State action. Thus, any error found by the court in *Agard I* or *Agard II* must relate to ancillary, non-textual Fifth Amendment analysis.

Furthermore, the Fifth Amendment does not apply to a statement about credibility because there is no factual or informational assertion by the defendant. The prosecutor's summation remarks that are the focus of this case did not refer to any fact or information provided by defendant. The argument in question did not call defendant a liar or ask the jury to discount his factual recitation

because the State believed that defendant was disingenuous. Rather, the prosecutor's argument only asked the jury to assess defendant's credibility through his testimony. The Fifth Amendment does not apply to an assessment of credibility because this is not a factual or informational assertion by the defendant about the elements of the crime; credibility does not establish criminal liability.

The reasoning in *Griffin* should not be imported to a claim that defendant's right to testify on his own behalf was unduly burdened. The core protection of the Fifth Amendment testimonial privilege has been expanded to prevent a prosecutor's comments about a defendant's choice to remain silent. *Griffin v. California, supra*. In *Griffin*, the Court reasoned that a defendant has an absolute Constitutional right to remain silent and that a prosecutor's comments about silence put too heavy a burden on the right. In essence, it is impermissible to infer guilt from silence. The *Griffin* decision, moreover, relegated the compulsion aspect of the Fifth Amendment to secondary status.

In *Agard I* the court adopted the *Griffin* reasoning to hold that the prosecutor's remarks impermissibly burdened the defendant's Fifth Amendment right to testify on his own behalf. *Agard I*, at 712. This analysis should be rejected. First, this is a novel expansion of the Fifth Amendment protection and the holding in *Griffin*. The *Agard II* court rejected the belated argument that a new rule of constitutional law should not be made *via* a habeas corpus petition. *Teague v. Lane*, 489 U.S. 288 (1989). Although the court in *Agard II* could, and did, reject the *Teague* argument, this was an improvident exercise of discretion. *Agard I* and *Agard II* are not so within the

mainstream of conventional wisdom that petitioner should have anticipated a novel result. In *Agard II* the court realized that there was merit to petitioner's contention that this was a new rule of constitutional law. *Agard II*, at 100. The better practice would have been to analyze this issue. At a minimum the result in this case should be precluded because it is a new rule.

Second, the fabric of traditional Fifth Amendment analysis has been stretched thin. The rule that a prosecutor cannot comment on a defendant's right to remain silent is derivative of the amendment itself and has often been called into question. See, *Mitchell v. United States*, ___ U.S. ___, 119 S.Ct. 1307 (1999) (Scalia, J., dissenting). Here, of course, defendant was present at trial and waived his Fifth Amendment testimonial privilege. Despite waiver of the privilege itself and the derivative right expounded in *Griffin*, the *Agard I* court used *Griffin* to expand a second derivative right; the right to testify on one's own behalf. Again, the prosecutor's comments were not about the substance of the defendant's testimony; rather they were a request for the jury to assess credibility. Thus, *Agard I* prevents argument about testimony which itself is not the subject of the Fifth Amendment privilege. Even though the defendant has already waived the core protection afforded by the Fifth Amendment, *Agard I* collaterally extends the umbrella of the amendment.

Third, the right of a defendant to testify is already an ancillary Fifth Amendment right. *United States v. Dunnigan*, 507 U.S. 87, 93 (1993) ("The right to testify on one's own behalf in a criminal proceeding is made explicit by federal statute . . . and, we have said, it is also a right implicit in the Constitution . . . "). The court in *Agard I*

used a corollary to the Fifth Amendment to support an ancillary right to a right which, at most, is implicit in the Fifth Amendment. Two wholly derivative rights were used to collaterally vacate a conviction, even though the defendant was afforded the full protection of the rights actually guaranteed in the Constitution. Two secondary adaptations of the Fifth Amendment should not be used to cross-validate each other when the textual provisions of the Amendment have been followed.

Lastly, if *Agard I* is correct, together with the holding of *Brooks v. Tennessee*, 406 U.S. 605 (1972), it unreasonably restricts the prosecution's ability to sum-up to the jury. In *Brooks* a Tennessee procedural rule, which required a defendant to either testify before any other defense witness or forego the right to testify, was held to be unconstitutional because it was an impermissible restriction on the defendant's right to testify. The Tennessee rule undercut the privilege by making its assertion costly and the State's interest in preventing testimonial influence is insufficient to override the defendant's right to remain silent. Still, the defendant ran the risk of having the jury assess the defendant's credibility in light of the colored or perjured testimony. *Id.* at 611-12.

Brooks, together with *Griffin*, unmistakably established that a defendant can choose if and when to testify. Furthermore, defendant can suffer no penalty if he exercises his right to be free of compelled testimony. The prosecution can only sum up as to the demonstrable errors or lacunae in the defendant's testimony. None of these rules, however, was originally meant to address the manner, as opposed to the substance, of the defendant's testimony. If *Agard I* and *Agard II* are affirmed, this new

rule, combined with the old rule, will prevent all argument except for a dry recitation of fact.

In *Agard I*, however, a dry recitation of fact would not have been fair to the prosecution. The defense summed up first and attacked the credibility of the victim and presented the defendant's story as the truth about the events in question. If *Agard I*, *Brooks* and *Griffin* were combined, the prosecutor's summation would be restricted to arguing that the jury should see whether the defendant's story made sense, or hung together, or any other catch phrase suggesting it was incorrect. The defendant's story, however, was incorrect because it was smooth, consistent and obviously the result of having molded his testimony to the form provided by what had gone on before him. The only proper response was to provide the jury with a suggested road map for assaying the defendant's credibility. If *Agard I* is permitted to bar the type of summation used here, the question of credibility, which may be determinative in one-on-one cases such as sex crimes, will be a cipher to the jury.

The *Agard I* Fifth Amendment holding should be rejected. There is no basis to conclude that the defendant's right to testify was in any way burdened by the prosecutor's summation. The defendant told his story and had the benefit of defense counsel's summation, which questioned the veracity of the victim. Since the Fifth Amendment was never meant to protect observations about credibility – as opposed to the content of the communication – there is no reason to cobble a new rule to prevent comment about a condition not protected by the Fifth Amendment. If the summation were irrelevant or otherwise objectionable, State rules of evidence and procedure are the proper repository for a solution. In

other terms, there is no need to federalize this area of law in order to reach a just result.

II.

THE PROSECUTOR'S SUMMATION COMMENTS ON DEFENDANT'S PRESENCE IN THE COURTROOM AND HIS RESULTANT OPPORTUNITY TO CONFORM HIS TESTIMONY TO THAT OF OTHER WITNESSES WERE PERMISSIBLE AND DID NOT HAVE A SUBSTANTIAL OR INJURIOUS INFLUENCE ON THE JURY'S VERDICT.

A. The Second Circuit's holding rests on an unwarranted extension of the rationale of *Griffin v. California*.

Griffin v. California precludes inviting the jury to treat the defendant's decision not to testify as substantive evidence of guilt. Because the Second Circuit applied this Fifth Amendment based prohibition to an entirely different constitutional right, under circumstances which could not have been contemplated by this Court and in a manner not supported by the reasoning of *Griffin*, its decision should be reversed.

1. Introduction.

A criminal defendant's right to be present during criminal proceedings arises from both the Confrontation and Due Process Clauses. The Sixth Amendment Confrontation Clause guarantees a criminal defendant's right to directly encounter witnesses (see, *Maryland v. Craig*, 497 U.S. 836, 846 [1990] ["Face-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness could wrongfully implicate an innocent person."]; *Coy v. Iowa*, 487 U.S. 1012, 1019-20 [1988] ["It is

always more difficult to tell a lie about a person 'to his face' than 'behind his back.' "]), the right to cross-examine those witnesses, and the right to be present at all material stages of the criminal proceeding. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 119-20 (1975). The right to confrontation is intended to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in an adversarial setting. *Maryland v. Craig, supra* at 845; see also, *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).

While the Sixth Amendment guarantees a defendant's right to be present at all stages of a trial at which presence would contribute to the opportunity for effective cross-examination (*Stincer*, 482 U.S. at 740), the Fourteenth Amendment grants the further "right to be present at any stage of the proceeding that is critical to its outcome if [defendant's] presence would contribute to the fairness of the procedure." *Id.* at 745. The combined effect of these two provisions guarantees defendants the right to be present at all "important stages" of the proceeding. See, e.g., *Diaz v. United States*, 223 U.S. 442, 454-55 (1912).

Although the right to face-to-face confrontation is a core value protected by the Confrontation Clause (*Craig*, 497 U.S. at 847, citing *California v. Green*, 399 U.S. 149, 157 [1970]), the right is not absolute. Thus, in *Craig*, this Court recognized that the right to face-to-face confrontation may give way when "necessary to further an important public policy . . . " *Craig*, 497 U.S. at 850. Further, the admission of the reliable hearsay statements of an unavailable declarant does not violate a defendant's confrontation right. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) See also *California v. Green*, 399 U.S. 149 (1970) (out of court statement properly admitted if declarant available for

cross-examination). A defendant may also forfeit the right by his own obstreperous behavior. *Illinois v. Allen*, 397 U.S. 337 (1970). Plainly, therefore, a defendant's right to be physically present at trial and to cross-examine adverse witnesses may be compromised and, under limited circumstances, entirely eliminated.

A defendant has a constitutional right to decide if and when to testify. *Brooks v. Tennessee*, 406 U.S. 605, 611-12 (1972), but one who does waive the right to remain silent and takes the stand in his or her own defense is subject to cross-examination regarding the credibility of that testimony. See, e.g., *Perry v. Leeke*, 488 U.S. 272, 283 (1989).

2. The prosecutor's comments did not burden defendant's Sixth Amendment right of confrontation.

In her summation at Agard's trial the prosecutor referred to the defendant as "the one who had an answer for everything" and argued that "[a] lot of what he told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." Near the end of her summation, the prosecutor stated:

> You know, ladies and gentlemen, unlike all the other witnesses . . . the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> * * *
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say

> and how am I going to say it? How am I going to fit into the evidence?
>
> * * *
>
> He's a smart man. I never said he was stupid . . . He used everything to his advantage.

The court below agreed with Agard that these comments violated his rights to confront the witnesses against him and to a fair trial. The court distinguished summation remarks from those uttered during cross-examination and held:

> It is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. *Agard v. Portuondo*, 117 F.3d 696, 703.

The court concluded that the prosecutor's comments violated Agard's "right to confrontation, his right to testify in his own behalf and his right to receive due process and a fair trial" because these remarks invited

> the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and, therefore, penalize him for exercising that right. The comments, which implied that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, forced defendants either to forego the right to be present at trial, forego their Fifth Amendment right to testify on their own behalf, or risk the jury s suspicion (footnote omitted). *Id.* at 709.

In so reasoning, the court below mischaracterized the facts and misplaced its reliance on this Court's holding in *Griffin v. California*.

In *Griffin* this Court recognized that judicial encouragement of the jury to infer *guilt* from the defendant's

decision not to testify – to view defendant's silence as substantive evidence of guilt – imposes an unwarranted penalty on a defendant's exercise of the constitutional right to refuse to testify. The holding of *Griffin* was expanded in *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), mandating that, upon request, the court instruct the jury that it may draw no adverse inference from defendant's failure to testify, and in *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972), declaring unconstitutional a state statute requiring defendants who opted to testify to do so before calling any other witness, because it made the assertion of the privilege to remain silent too "costly."

A defendant's right to remain silent is the counterpart of the right to testify on his or her own behalf.[3] Despite *Griffin's* prohibition on exacting a penalty as the price of exercising the right to remain silent, however, defendants are routinely "penalized" for their election to testify. But as this Court made clear in *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978), "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid." The rationale of the earlier holding in *McGautha v. California*, 402 U.S. 183, 214-15 (1971) was similar:[4]

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[3] Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment By Prior Conviction*, 42 Vill.L.Rev. 1, 46-55 (1997). The author catalogues types of impeachment deemed to impose permissible costs on the defendant's right to testify.

[4] The aspect of *McGautha* which gave rise to this observation (that guilt and penalty phases of a capital trial may be joined in a single proceeding) has not been overruled, but subsequent cases leave little doubt that bifurcated capital trials are constitutionally required. See, e.g., *Furman v. Georgia*, 408

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.
>
> * * *
>
> It does no violence to the privilege that a person's choice may open the door to otherwise inadmissible evidence which is damaging to his case.

Thus, the right to testify is subject to legitimate limits, as are many other constitutional rights. If the cost imposed on defendant's assertion of the right serves a valid and significant governmental purpose, it should be constitutionally permissible. This Court has repeatedly found that the purpose of assisting the jury to ascertain the truth and, more specifically to limit the effectiveness of perjured testimony, is a valid and sufficiently significant governmental goal to justify the cost to defendants' right to testify. Thus, the admission of impeaching evidence directed toward the content of defendant's testimony does not unduly burden defendant's exercise of the right to testify.

For instance, the defendant in *United States v. Dunnigan*, 507 U.S. 87 (1993) was charged with conspiracy to distribute cocaine. After she testified that she had never possessed or dealt cocaine, the trial court permitted the government to offer rebuttal testimony from witnesses

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U.S. 238 (1972) (per curiam); *Proffitt v. Florida*, 428 U.S. 242 (1976).

who said they had purchased cocaine from defendant. The court also enhanced her sentence based on its finding that she had committed perjury. The Court of Appeals for the Fourth Circuit found the enhancement of defendant's sentence an unconstitutional inhibition of defendant's right to testify on her own behalf. Although this Court confirmed that the defendant had a right to testify, it reversed, declaring:

> Respondent cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury. 507 U.S. at 96.

Earlier, in *Nix v. Whiteside*, 475 U.S. 157 (1986), the Court had similarly concluded that a criminal defendant's right to testify did not include the right to commit perjury:

> Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely . . . [because] there is no right whatever – constitutional or otherwise – for a defendant to use false evidence. 475 U.S. at 173.

To prevent perjurious testimony the Court has also permitted the impeachment of defendants by improperly obtained evidence. Thus, in *Harris v. New York*, 401 U.S. 222 (1971), ratifying the use of defendant's uncounseled statements for impeachment purposes, this Court again rejected the notion that the right of a defendant to testify or remain silent can "be construed to include the right to commit perjury." 401 U.S. at 225. See also *Oregon v. Hass*, 420 U.S. 714 (1975) (the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense . . . " 420 U.S. at 721-22).

The focus of the Court's inquiry in these cases was the probity of portions of defendant's testimony and what inferences a jury should be permitted to draw from comparison of that testimony with prior inconsistent statements; in each case the impeachment evidence directed at the content of defendant's testimony was admissible *only* because the defendant opted to testify on his or her own behalf. The affirmative penalty on the defendant's assertion of the right to testify was deemed permissible because of the resultant advancement of the search for truth by enhancing the jury's ability to evaluate defendant's credibility on specific issues.

Indeed, a defendant's very status as defendant is routinely permitted to be brought to the jury's attention by the instruction that a testifying defendant may be impeached by his or her interest in the outcome of the case, presumably even in the absence of cross-examination on the subject. *United States v. Johnson*, 756 F.2d 453 (6th Cir. 1985); *United States v. Nunez-Carreon*, 47 F.3d 995 (9th Cir.), *cert. denied*, 515 U.S. 1126 (1995).

Similarly, when a defendant testifies at trial or otherwise presents a defense, the prosecutor in his summation is entitled to comment on defendant's failure "to support his own factual theories with witnesses." *United States v. Yuzary*, 55 F.3d 47 (2nd Cir. 1995). Even in a criminal case, a party's failure to produce witnesses or other non-cumulative evidence peculiarly within its control creates a presumption that the unproduced evidence would have been unfavorable. This neither shifts the burden of proof nor violates the defendant's right to testify.

The Second Circuit improperly transposed the Fifth Amendment analysis developed in *Griffin* to a Sixth Amendment claim. Here, the Sixth Amendment claim

only arose because defendant waived the protection of the Fifth Amendment and testified. If he had elected not to testify, there would have been no burden on his confrontation rights. In *Agard I* the court decided that the prosecutor's comments about defendant's credibility made defendant's exercise of his Sixth Amendment right too costly. But the Sixth Amendment right with regard to the timing of a defendant's testimony protects a procedural choice, not the substance of the testimony presented. Indeed, there can be little doubt that the defendant's decision whether or not to testify is based upon an assessment of the case presented against him: the weaker the case the less likely the testimony.

On the other hand, a defendant's decision about his Sixth Amendment rights is not devoid of content. Because it is based on trial factors rather than a theoretical assessment of constitutional protections, the choice in and of itself reflects on the defendant's credibility. The *Griffin* analysis developed not out of a concern for credibility; the only consideration was whether the jury would infer guilt from silence. Since there is little or no likelihood that a jury will infer guilt from the time or manner of exercising the Sixth Amendment right to confrontation, the rationale of *Griffin* is simply inapplicable in the context of the Sixth Amendment. Here defendant received the full textual protection of both the Fifth and Sixth Amendments; rights ancillary to the amendments should not be used to collaterally vacate the conviction. The textual rights will be drained of meaning if they become a subset of unpredictable ancillary rights.

3. Even assuming that defendant's right to confrontation was burdened by the prosecutor's summation remarks, that burden was not of the same type or degree as the one condemned by this Court in *Griffin*.

Here, to the extent a burden existed, it was not on the act of testifying but rather on the act of testifying falsely. The prosecutor's comment was only indirectly related to defendant's right to be present; its thrust was "not that defendant was present at trial but that his presence gave him an opportunity to conform his testimony." *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432, 439 (Mich. 1985); *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569, 570 (N.J. 1978); *State v. Cassidy*, 236 Conn. 112, 672 A.2d 899, 918 (Conn. 1996) (Callahan, J., dissenting). Nor can it be logically concluded that the prosecutor's manifest intent was to comment on the defendant's exercise of his right to testify or that the character of the remark assured that the jury would so construe it.

In *Griffin*, the inference the jury was asked to draw was not only sanctioned by the trial court, but was also a natural consequence of defendant's failure to testify. As one commentator has credibly theorized, juries are far more likely to understand, and therefore follow, an instruction to either disregard certain evidence or apply it only to certain issues, than one asking them not to draw any inference from the fact that defendant did not testify.[5]

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[5] "[T]he accused's failure to testify affirmatively raises the jurors' probability assessment of guilt from the baseline level. No matter how vigorously the court instructs the jurors not to take into account that failure to testify, they are almost certain to do so. * * * The only way to make sense of the instruction is to treat it as a charge to assume that, whether innocent or guilty, the defendant was equally likely to decline to testify. But, especially if the case against the defendant appears strong, so that an innocent defendant would be likely to testify, this assumption is contrary to the realities of the situation, and even more contrary to the jury's understanding of the situation. Thus, the jury can hardly help but ignore the instruction." Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis And A Proposed Overhaul*, 38 UCLA L. Rev. 637, 667-68 (1991); see also *Mitchell*, ___ U.S. ___, 119 S.Ct. at 1316 (Scalia, J., dissenting).

In *Griffin* this Court also noted the potential impact of judicial imprimatur on the jury's native propensity to draw an inference adverse to defendant: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 380 U.S. at 614. Here the challenged comments were made by the prosecutor rather than the court; while they arguably fell in the middle of this continuum of influence, they were effectively neutralized by the trial court's cautionary instruction that the arguments of counsel were not evidence.

> The test for determining whether the prosecutor's remarks were constitutionally impermissible is: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir.), *cert. denied*, 519 U.S. 862 (1996) (internal quotations and citations omitted).

In sharp contrast to *Griffin*, here there was no direct comment on defendant's assertion of his right to confrontation or of his right to testify; the prosecutor limited her remarks to pointing out the unique advantage to a defendant of having the opportunity to hear all the testimony before testifying. More significantly, however, the Second Circuit's suggestion, that the jury could infer from the remarks that an innocent defendant would not have attended the trial and would have testified first, is illogical; it defies common sense that a defendant's decision *to* testify would be viewed by the jury as evidence of consciousness of guilt. Simply stated, the holding of *Griffin*, that comment on a defendant's refusal to testify is impermissible because the jury might draw an adverse inference, and the Second Circuit's rationale that an inference of guilt might be drawn from defendant's decision *to* testify, are mutually exclusive.

As previously noted, here, unlike in *Griffin*, the prosecutor's closing remarks cannot be construed as a suggestion that the jury treat Agard's mere presence in the courtroom during the entire trial as substantive evidence of his guilt. Equally significantly, however, a reasonable reading of the prosecutor's comments in this case refutes the Second Circuit majority's interpretation that they "invited the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt . . . " or that they implied that a "truthful defendant" would have stayed out of the courtroom or would have testified before other evidence was presented. Rather, as the dissenter correctly observed, the prosecutor was merely pointing out what was obvious to the jurors who had likewise been present throughout the 10-day trial: "That the defendant also was there and could hear the State's

witnesses testify before he offered his own version of the events in question" *Agard*, 117 F.3d. at 718 (Van Graafeiland, J., dissenting). The prosecutor did not ask the jury to infer guilt from defendant's mere presence during the trial; she simply suggested that, when assessing his credibility during their deliberations, the jury could consider the fact that the defendant's testimony was largely harmonious with that of the victims.

Also unlike in *Griffin*, where defendant was completely denied the exercise of his Fifth Amendment right by virtue of the trial court's comments to the jury, the prosecutor's argument here did not abridge Agard's right of confrontation. He was present throughout the trial, cross-examined prosecution witnesses and, in general, was permitted to effectuate all components of the right. Since the reliability of prosecution witnesses was tested before the jury, defendant was afforded the full benefit of the right to confrontation. While the Second Circuit apparently sought to protect "the opportunity of a defendant to fabricate or conform testimony without comment, and the opportunity granted by the Fifth and Sixth Amendments . . . ", (*Agard*, 117 F.3d at 710) no such right exists. In a criminal trial, both sides are entitled to fairness; constitutional rights designed as shields against governmental abuses should not be permitted to provide a defendant with an undue advantage over the prosecution in the adversarial process.

4. Additional defects in the Second Circuit's analysis contributing to its erroneous decision.

The Second Circuit incorrectly asserted that Agard did not have an opportunity to respond to the prosecutor's comments. New York courts have broad discretion to permit a defendant to reopen his case after resting. *People v. Olsen*, 34 N.Y.2d 349, 357 N.Y.S.2d 487, 313 N.E.2d 782 (1974). Here, defense counsel sought to reopen neither his case (*People v. Ruine*, ___ A.D. ___, 685 N.Y.S.2d 47 [1st Dep't 1999]; see, *People v. Bartolomeo*, 126 A.D.2d 375, 513 N.Y.S.2d 981 [2nd Dep't 1987]), nor his summation (see, *People v. Gonzalez*, 68 N.Y.2d 424, 431, 590 N.Y.S.2d 795, 502 N.E.2d 583 [1986]) to counter the allegedly prejudicial prosecutorial assertion. In any case, respondent clearly anticipated the argument by raising the issue first.

Nor did the prosecutor's argument belatedly inject innuendo concerning bias or credibility into the case.

> The specter of fabrication pervaded the trial from its opening day. Winder testified that Agard committed anal sodomy on her; Agard said that he did not. One of them was not telling the truth. *Agard*, 117 F.3d at 720 (Van Graafeiland, J., dissenting).

The Second Circuit also erred in requiring an evidentiary showing for the prosecutor's remarks; there is simply no basis in this Court's jurisprudence for requiring such a predicate. It underestimates the common sense of the jury to presume that they failed to grasp the obvious fact that, unlike other witnesses, defendant was present throughout the trial and testified last, and that they were simply being asked to consider these factors in assessing witness credibility.

A defendant who testifies on his own behalf occupies the same position as any other witness at trial. *Brown v. United States*, 356 U.S. 148, 154-55 (1958). Permitting the prosecutor to ask the jury to consider defendant's presence in the courtroom in assessing his credibility may, like any other method of impeachment, impose a limited "cost" on the defendant's decision to testify. But, if the "primary object" of the Confrontation Clause is the search for the truth (*Douglas v. Alabama*, 380 U.S. 415, 418-19 [1965]), then permitting prosecutorial comment on what is, after all, patent to the jury, serves the significant countervailing State interest directly related to a crucial aspect of the truth-seeking process – the ability of the fact finder to fairly assess the credibility of the witnesses most obviously interested in the outcome of the case.

When a defendant subjects himself to cross-examination, one aspect of the credibility issue is whether his version of events has been fabricated. Asking a jury to consider whether that testimony was tailored to that of the other witnesses is a proper inquiry. The constitutional right of a defendant to be present at trial and to confront witnesses should not be extended to embrace a "right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts." *State v. Smith*, 82 Wash. App. 327, 917 P.2d 1108, 1112 (Wash.App.Div. 1996).

B. Defense counsel's summation "invited" the prosecutor's remarks.

In his summation defense counsel characterized the complainant's allegations as fabrications, argued that Agard's testimony was consistent with that of his

accusers, and suggested that the jury compare the credibility of Agard and the prosecution witnesses. These comments clearly invited the prosecutor's comments, which did no more than "right the scales." *United States v. Young*, 470 U.S. 1, 11 (1985).

The circumstances of this case are analogous to those in *United States v. Robinson*, 485 U.S. 25 (1988). In *Robinson*, the prosecutor noted in rebuttal summation that the defendant, who had not testified, "could have taken the stand and explained [his version of events] to you." *Id.* at 26. This Court agreed with the government's contention that, although "direct," the prosecutor's comment was responsive to defense counsel's concluding arguments. The Court emphasized that both sides in a criminal trial are entitled to an "opportunity to meet fairly the evidence and arguments of one another." *Id.* at 869 (citing *United States v. Nobles*, 422 U.S. 225 [1975]). Based on its review of the challenged prosecutorial comment in context, this Court found that it did not warrant the application of the "broad dicta in *Griffin*" to the facts of *Robinson*:

> It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as *substantive evidence of guilt*; it is quite another to urge . . . that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some 'cost' to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one. *Id.*, at 33 (emphasis supplied).

C. Under the narrow standard of federal habeas review of a claim of prosecutorial misconduct the comments had no substantial and injurious effect.

Generally, a criminal conviction "is not to be lightly overturned on the basis of a prosecutor's comments standing alone" in an otherwise fair proceeding. *United States v. Young*, 470 U.S. 1, 11 (1985) (prosecutor's improper remarks expressing his personal belief that the defendant was guilty did not constitute reversible error).

The standard of habeas review is considerably narrower than it is on direct appeal. A federal habeas court's scope of review is "the narrow one of due process, and not the broad power that [it] would possess in regard to [its] own trial court." *Donnelly v. DeChristofaro*, 416 U.S. 637, 642 (1974). "Federal habeas challenges to state convictions entail greater finality problems and special comity concerns . . . [T]he burden of justifying federal habeas relief for state prisoners is 'greater than the showing required to establish plain error on direct appeal.' " *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

The role of Federal habeas proceedings, although important, is a secondary and limited one in comparison to direct review. "Federal courts are not forums in which to re-litigate state trials." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), citing *Barefoot v. Estelle*, 463 U.S. 880 (1983). Thus, "error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" *Id.*, at 1720, citing *United States v. Frady*, 456 U.S. 152, 165 (1982). These distinctions arise from the "State's interests in the finality of convictions . . . ;" principles of comity and federalism; and the view that

"[l]iberal allowance of the writ . . . degrades the prominence of the trial itself" and encourages habeas petitioners to re-litigate their claims on collateral review. *Id.* at 635.

Prosecutors must be given "reasonable latitude to fashion closing arguments" and to argue reasonable inferences based on the evidence. *United States v. Necoechea*, 986 F.2d 1273 (9th Cir. 1993). Thus, they are allowed to deal "hard blows," although not "foul" ones. *United States v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); *People v. Ashwal*, 39 N.Y.2d 105, 109, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976). Additionally, the prosecutor's comments must be viewed against the background of defense counsel's closing argument, can only be evaluated in their relationship to that summation and arguments advanced by the latter may be responded to by the former. *United States v. Matthews*, 20 F.3d 538 (2nd Cir. 1994); *United States v. Pelullo*, 964 F.2d 193 (3rd Cir. 1992).

A prosecutor's remarks during summation warrant the granting of a writ of habeas corpus only if the defendant establishes that the comments had a "substantial and injurious effect or influence on the jury's verdict." *Bentley v. Scully*, 41 F.3d 818, 824 (2nd Cir. 1994). In assessing whether a habeas petitioner has satisfied this showing, the court must also consider any curative measures the trial court may have taken to prevent prejudice, and whether the defendant's conviction was certain absent the prejudicial conduct. *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2nd Cir. 1991).

This trial was eminently fair and the evidence was strong enough to prompt the state appellate court to characterize it as overwhelming:

> The complainant testified that on May 6, 1990, the defendant held a gun to her head, threatened to kill her, and beat her in the course of forcing her to have anal intercourse by 'forcible compulsion.' Later at the emergency room of a hospital, the victim was found to have bruises on her arms and legs, a cut lip, and a black eye so seriously battered that she had hemorrhages in it four to five weeks later, as well as floating spots up to the day of trial. In addition, the defendant admitted to owning a gun, which was recovered by the police. *People v. Agard*, 119 A.D.2d 401, 402, 609 N.Y.S.2d 239 (2nd Dep't 1993).

Although this assessment is not binding on a federal habeas court, it is certainly entitled to a high degree of deference.

The prosecutor's remarks constituted a fair response to defense counsel's summation and suggested reasonable, logical and permissible inferences for the jury's consideration. Significantly, the trial court explicitly instructed the jury to consider only the evidence and emphasized that counsel's summations did not constitute evidence. Under the limited scope of collateral habeas review the challenged remarks did not cause substantial prejudice to respondent and did not undermine confidence in the certainty of conviction in their absence. In the real world of criminal jury trials, the effect of the challenged comments was *de minimis*. See *United States v. Cruz*, 797 F.2d 90 (2nd Cir. 1986). Because it can fairly be said that respondent's conviction resulted from the jury's assessment of the evidence and not from improper argument by the prosecutor, the order of the Second Circuit should be reversed.

CONCLUSION

AMICUS CURIAE – THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION – REQUEST THAT THE DECISION OF THE CIRCUIT COURT IN *AGARD I* AND *AGARD II* BE REVERSED FOR THE REASON STATED HEREIN.

DATED: Riverhead, New York
June 7, 1999

Respectfully submitted,

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No. 98-1170

IN THE

Supreme Court of the United States

LEONARD PORTUONDO, SUPERINTENDENT,
FISHKILL CORRECTIONAL FACILITY,
Petitioner,

v.

RAY AGARD,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Second Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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August 9, 1999

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution.

The issue before this Court is the constitutionality of a prosecutor's comments urging the jury to infer that the defendant tailored his testimony to that of the prosecution's witnesses, where such comments were made for the first time on summation, without any evidence to support the inference, and based solely on the fact that the defendant exercised his right to be present in the courtroom throughout his trial. The NACDL asks the Court to hold that such comments are unconstitutional as they needlessly penalize the assertion of the defendant's constitutional rights. The Court's resolution of this matter will impact virtually every criminal trial in which a defendant contemplates testifying in his own defense. The NACDL, therefore, has a significant interest in the outcome of this case.

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is a fundamental principle of constitutional law that the state may not penalize an individual's exercise of a constitutional right by making the assertion of that right costly. That principle controls this case and was properly applied by the Court of Appeals. The Second Circuit's holding in this case was a narrow one. The court held that the prosecutor penalized Ray Agard's exercise of his rights guaranteed by the United States Constitution when she urged the jury to infer that Agard had tailored his testimony to that of the prosecution's witnesses "1) for the first time on summation; 2) without facts in evidence to support the inference; [and] 3) in a manner which directly attack[ed] [Agard's] right to be present during his entire trial." Pet. App. 46a. These comments, which could be made of any defendant who exercises his right to confront the witnesses against him and then testifies in his own defense, do not promote, and indeed undermine, the truth-seeking function of the adversarial process. The prosecutor's comments thus needlessly forced Agard to pay a price for having exercised his Sixth Amendment right to attend his trial and to confront the witnesses against him and, therefore, were unconstitutional.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held it unconstitutional for a prosecutor to urge the jury to draw an inference adverse to the defendant based solely on the defendant's exercise of his Fifth Amendment right to remain silent. That adverse inference penalized the defendant by allowing the state to enlist his exercise of the right to remain silent to prove its case against him. It thus diminished the value of the right by making its assertion costly. *Id.* at 614. Since then, this Court has reaffirmed this "penalty" principle, applying it in many different contexts, both civil and criminal, and with respect to penalties imposed on many different constitutional rights.

The prosecutor's comments here constituted precisely the type of penalty proscribed by *Griffin* and its progeny. The trial below turned almost exclusively on the testimony of the complaining witnesses, Nessa Winder and Breda Keegan, and the defendant, Ray Agard. Their accounts of many of the underlying events were entirely consistent. Their accounts of other events, however, diverged. The credibility of these witnesses was thus at the heart of the case. In her summation, the prosecutor urged the jury to infer, without any evidence to support the inference, that Agard had abused his right to be present in the courtroom by tailoring his testimony to "fit" that of the prosecution's witnesses. The Court of Appeals properly saw these comments for what they were: "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial." Pet. App. 72a. Put another way, the prosecution was able to enlist Agard's exercise of his right to be present at trial to aid in carrying its burden of proof and to increase the likelihood of conviction. Furthermore, the only way to avoid or even counter such an attack would have been for Agard either to have waived his confrontation rights altogether and absented himself from the courtroom while the state's witnesses testified against him, or to have refrained from testifying at all. This is precisely what this Court's penalty jurisprudence forbids.

Contrary to the position urged by the United States as *amicus curiae*, this Court's penalty jurisprudence is not somehow inapplicable here merely because Agard took the stand to testify in his own defense. The United States relies primarily on cases in which a defendant was not permitted to invoke his Fifth Amendment right to silence to avoid impeachment after having *waived* that right by taking the stand. That is not this case. Here, Agard in no way waived his right to confront the witnesses against him by taking the stand in his

own defense and, therefore, could not be penalized for having exercised that right. This Court's precedents make clear that when a defendant takes the stand as a witness in his own defense, he does not forfeit the rights that the Constitution guarantees him *as a defendant*. Although the prosecution may seek to ensure the reliability of any witness's testimony, when that witness is the defendant, it cannot do so at the expense of constitutional rights that he has not waived.

The prosecution's unfounded bolstering of its case at the expense of Agard's constitutional rights was not only unnecessary to further the truth-seeking function of the trial, but affirmatively undermined that goal. Comments casting suspicion on a defendant's mere presence in the courtroom are no more effective against the guilty than against the innocent: a defendant whose testimony "fits" the state's evidence because he is innocent is just as likely to suffer an adverse inference as a guilty defendant whose testimony "fits" because he has tailored it to the testimony he has heard. Indeed, such comments may be more effective against innocent defendants because the truthful testimony of an innocent defendant will more often "fit" the testimony of the State's witnesses. And because there are numerous valid and important reasons for a defendant to be present at trial, the inference of tailoring drawn from the exercise of that right is infused with unreliability.

As such, the state's argument that this type of impeachment by conjecture and innuendo is necessary to prevent defendants from using the Sixth Amendment as a vehicle to commit perjury is completely untenable. In support of this argument, the state and its *amici* point to cases in which a defendant was not permitted to invoke a constitutional right to avoid being cross-examined with evidence of prior inconsistent statements or conduct. Those cases have no relevance to this one. Here, the prosecutor's summation comments in no way furthered the

truth-seeking function of cross-examination and the adversary process, as they were based on nothing more than Agard's presence at trial, were not supported by any evidence, and shed no light whatsoever on his guilt or innocence. As the Court of Appeals correctly held, the state thus placed a penalty on Agard's constitutional right to confront his accusers without advancing any state interest. The decision of the Court of Appeals should be affirmed.

ARGUMENT

THE PROSECUTOR'S COMMENTS IN SUMMATION THAT AGARD USED HIS PRESENCE IN THE COURTROOM TO TAILOR HIS TESTIMONY TO THE PROSECUTION'S CASE VIOLATED AGARD'S CONSTITUTIONAL RIGHTS.

A defendant's right to be present at his trial is "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause," *Illinois v. Allen*, 397 U.S. 337, 338 (1970), and is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). In this case, the prosecutor asked the jury in closing argument to draw an adverse inference from Agard's exercise of that right, stating that "unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? . . . He used everything to his advantage." J.A. 49. Without reference to any evidence suggesting that Agard had tailored his testimony after hearing the prosecution's case, these comments encouraged the jury to discredit Agard's testimony based on nothing but the exercise of his constitutional right to attend his own trial. As such, they

penalized Agard's constitutional right to be present in the courtroom at every stage of his trial. Moreover, because this penalty was wholly unnecessary to further, and may even have distorted, the truth-seeking function that impeachment is intended to advance, the penalty imposed by the prosecutor's comments was unconstitutional.

A. This Court's Penalty Jurisprudence Mandates the Result Reached By the Court of Appeals.

It is a firmly established principle of constitutional law that the state may not penalize an individual's exercise of a right guaranteed by the United States Constitution. This principle pervades every area of constitutional law and has been applied by this Court in many different contexts, both civil and criminal. As defined by this Court, any conduct of the state that diminishes a constitutional right by making its assertion costly is a penalty. Here, the prosecution's comments in summation penalized Agard's constitutional rights by urging the jury to discredit his testimony—thereby increasing the likelihood of conviction—based on nothing but the fact that he had exercised his right to be present at trial.

1. The Prosecutor's Comments Imposed a Penalty on Agard's Exercise of His Constitutional Rights.

In *Griffin v. California*, this Court held it unconstitutional for a prosecutor to urge the jury to draw an inference adverse to the defendant based on the defendant's exercise of a constitutional right. 380 U.S. at 613-14. There, the defendant attended his trial and exercised his Fifth Amendment right to remain silent. In closing argument, the prosecutor attempted to capitalize on the defendant's silence by urging the jury to consider it against the defendant in determining whether the state had proved its case. According to the Court, these

remarks effectively "allow[ed] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." *Id.* at 613. As such, the prosecutor's comments constituted "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

Because there are numerous reasons why a defendant might decline to take the stand, the Court noted that it was sheer speculation for the jury to assume that the defendant's silence was evidence of his guilt. *Id.* at 613. For the same reason, the Court rejected the argument that the prosecution's comments did not exact a penalty because it was "natural and irresistible" for the jury to draw an adverse inference from the defendant's exercise of his constitutional right not to testify. *Id.* at 614. According to the Court, whatever the jury may have inferred on its own was irrelevant to the constitutional issue. Regardless of the jury's inclinations, the state was not at liberty to "solemnize" the jury's unguided speculation about the defendant's exercise of his constitutional rights into an adverse inference against him. *Id.*

Shortly after *Griffin* was decided, this Court relied on it in striking down a portion of the Federal Kidnaping Act as effecting an unconstitutional penalty on a defendant's Sixth Amendment right to a jury trial. *United States v. Jackson*, 390 U.S. 570, 583 (1968). Under that act, only a jury could impose the death penalty and, thus, only by pleading guilty and waiving one's right to a jury trial could a defendant ensure that the death penalty would not be imposed. According to the Court, the statute's selective death penalty provision "needlessly penalize[d] the assertion of a constitutional right." *Id.* (citing *Griffin*, 380 U.S. 609). In turn, the "inevitable effect" of the statute was to discourage a defendant's assertion of the Sixth Amendment right to a jury trial and the Due Process right not

to plead guilty. *Id.* at 581. Because that chilling effect was "unnecessary and therefore excessive," *id.* at 582, it was unconstitutional.

Similar reasoning underlay this Court's opinion in *Brooks v. Tennessee*, 406 U.S. 605 (1972). There, the Court invalidated a state statute that required a defendant desiring to testify to do so before any other defense witnesses. *Id.* at 609-12. The Court held that the statute unconstitutionally penalized a defendant's initial decision not to testify because that decision barred the defendant from testifying at the end of the case and thus "'cut[] down on the privilege (to remain silent) by making its assertion costly.'" *Id.* (quoting *Griffin*, 380 U.S. at 614).

This Court has applied the same reasoning in striking down penalties in numerous other contexts, both criminal and civil, including penalties on the right to vote, *see Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution"); the rights to free speech and association, *see, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) ("If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible") (internal quotation marks and citation omitted); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down right-of reply statute that "exact[ed] a penalty" on speech); the right to travel, *see Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding that denial of welfare benefits constituted unconstitutional penalty on right to travel, (quoting *Jackson*, 390 U.S. at 570), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); and the right against compulsory self-incrimination, *see Spevak v. Klein*, 385

U.S. 511, 515 (1967) (citing *Griffin* for proposition that threat of disbarment constitutes a "penalty" on an attorney's right to remain silent in disciplinary proceedings) (opinion of Douglas, J.); *see also Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) ("plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights") (internal quotation marks and citation omitted).

Finally, only last Term, in *Mitchell v. United States*, 119 S. Ct. 1307 (1999), this Court applied *Griffin* in the sentencing context and held that, even though the defendant already had pled guilty, the district court could not draw an adverse inference from the defendant's refusal to testify at her sentencing hearing. The fact that the defendant's substantive guilt was no longer at issue was irrelevant. What was important was that the defendant still possessed a Fifth Amendment privilege. *Id.* at 1315-16 (citing *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981)). As long as she retained the right to remain silent, she could not be penalized for her invocation of that right by means of an adverse inference that would lead to the imposition of a higher sentence. *Id.*

These cases make clear that the Court of Appeals properly applied the penalty analysis of *Griffin* and its progeny here. The proscription against penalizing constitutional rights is a fundamental principle that applies in both civil and criminal contexts, wherever an individual is forced to pay a price for the exercise of a constitutional right. Yet, based solely on Agard's exercise of his Sixth Amendment right to be present in the courtroom throughout his trial, *Allen*, 397 U.S. at 338, the prosecutor urged the jury to draw the adverse inference that Agard's testimony should be discounted because he had tailored his testimony to that of the prosecution's witnesses. J.A. 49. The prosecution was thus allowed to enlist Agard's exercise of

his right to be present at trial to aid in carrying its burden of proof and to increase the likelihood that Agard would be convicted. *See Griffin*, 308 U.S. at 613; *cf. Mitchell*, 119 S. Ct. at 1316. As the Court of Appeals correctly held, the prosecutor's comments penalized Agard's right to be present at trial by making his assertion of that right costly. Pet. App. 41a-43a. That is precisely the type of penalty prohibited by *Griffin* and its progeny.[2]

Moreover, to avoid that penalty, Agard either would have had to waive his confrontation rights and absent himself from the courtroom while the state's witnesses testified against him, or refrain from testifying altogether. This Court has held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *See Simmons v. United States*, 390 U.S. 377, 394 (1968). Where, as here, credibility is the central issue at trial, *see* Pet. App. 34a; Br. of United States at 11, there is a very real possibility that a testifying defendant in Agard's position would be forced to waive his right to confront the witnesses against him in order to preserve his credibility with the jury. Pet. App. 41a ("The comments, which imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, force defendants either to forgo

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[2]The state's contention that Agard's Sixth Amendment right to be present at his trial was not violated because Agard fully exercised that right, Pet. Br. at 31-33, has been soundly rejected by this Court. *See, e.g., Brooks*, 406 U.S. at 611 n.6 ("The dissenting opinions suggest that there can be no violation of the right against self-incrimination in this case because Brooks never took the stand. But the Tennessee rule [requiring a defendant desiring to testify to do so first among defense witnesses] imposed a penalty for petitioner's initial silence, and *that penalty* constitutes the infringement of the right.") (emphasis added). *See also Griffin*, 380 U.S. at 613-14 (penalty of adverse inference violated defendant's constitutional right to remain silent notwithstanding fact that defendant fully exercised that right by not taking the stand).

the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion.") (footnote omitted). Thus, as in *Jackson*, the "inevitable effect" of comments such as those at issue here is to chill the defendant's exercise of his constitutional right to be present throughout his trial. *See Jackson*, 390 U.S. at 581.

The state and its *amici* argue that the Court's penalty analysis does not apply here because the penalty imposed on Agard was an adverse inference concerning his credibility, as opposed to his substantive guilt. Pet. Br. at 15; Br. of the United States at 18-26; Br. of the New York State Dist. Attorneys Ass'n at 22. That is a distinction without a difference. As the cases discussed above make clear, *supra*, pp. 6-9, the prohibition against penalizing an individual's exercise of a constitutional right has been applied in numerous contexts and has never been limited to adverse inferences of a criminal defendant's guilt. Moreover, this Court has recognized that where a criminal trial turns almost entirely on the credibility of the witnesses, "'impeaching the defendant's credibility is to imply, if not [to] prove, guilt.'" *Loper v. Beto*, 405 U.S. 473, 483 (1972) (plurality opinion) (invalidating impeachment by use of prior conviction resulting from trial in which defendant had been denied right to counsel) (quoting and adopting *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir. 1970)). *Cf. Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("the most important witness for the defense in many criminal cases is the defendant himself"). Here, the parties do not dispute that the prosecution's case turned entirely on whether the jury believed Agard's testimony or that of the complaining witnesses. The adverse inference that the prosecution urged the jury to draw with respect to Agard's credibility thus *was* an adverse inference going to his substantive guilt, and was prohibited even under the state's artificially restrictive interpretation of this Court's penalty jurisprudence.

2. Agard Did Not Forfeit His Right to Be Free from Unconstitutional Penalties Merely Because He Testified on His Own Behalf.

The United States, as *amicus curiae*, contends that the Court's penalty jurisprudence is inapplicable here because once a defendant decides to testify, he may be treated the same as any other witness for the purpose of ensuring the reliability of his testimony. Br. of the United States at 13-18, 22. That is not the law. To the contrary, this Court has made clear that when a defendant takes the witness stand, he retains the rights guaranteed by the Constitution to all defendants and that those rights do not automatically yield to the prosecution's need to ensure the reliability of the defendant's testimony.

This Court twice has held that the interest in preventing improper influences on a defendant's testimony does not justify burdening the defendant's exercise of rights guaranteed by the Constitution. In *Brooks*, 406 U.S. at 612, the Court struck down a Tennessee statute that required criminal defendants wishing to testify to do so before all other defense witnesses. *See supra*, p. 8. That statute was an attempt to reconcile the "ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony" with the defendant's right to be present at trial. *Brooks*, 406 U.S. at 607. Despite recognizing the importance of preventing the defendant from "coloring his testimony to conform to what has gone before," the Court concluded that exacting a price for a defendant's exercise of his right to remain silent by foreclosing later testimony unless he chooses to testify first was "not a constitutionally permissible means of ensuring [the] honesty" of his testimony. *Id.* at 611. The *Brooks* Court thus flatly rejected the notion that the interest in preventing tailored testimony could justify treating a criminal defendant, whose rights are

protected by the Constitution, the same as other witnesses, who are not entitled to the same protections. *Id.* at 611 n.5.

In *Geders v. United States*, 425 U.S. 80 (1976), the Court struck down an order of the trial court prohibiting the testifying defendant from consulting with his attorney during an overnight recess, finding that it infringed the defendant's Sixth Amendment right to assistance of counsel. *Id.* at 91. Although the order was intended to prevent improper influence on testimony, the Court held that because that interest could be advanced by other means that would not infringe the defendant's Sixth Amendment rights, the conflict between the defendant's right to consult with his attorney during an overnight recess and the prosecutor's desire to prevent improper testimonial influence had to be resolved in favor of the defendant's Sixth Amendment right. *Id.*

Brooks and *Geders* make clear that the state's interest in preventing improper testimonial influence does not justify treating a defendant the same as any other witness when doing so would burden a constitutional right unique to the defendant.[3] Nor is it relevant that the state's witnesses would be vulnerable to impeaching comments by defense counsel had they been present in the courtroom during the testimony of other witnesses. Br. of United States at 11; *see also* Pet. App. 76a; Pet. Br. at 7, 41-42; Br. of United States at 24 n.11. Indeed, the *Brooks* Court rejected precisely such an argument when it noted that the burden imposed by a requirement that the defendant testify first among defense witnesses "is not lightened

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[3] *Perry v. Leeke*, 488 U.S. 272 (1989), is not to the contrary. *See* Pet. Br. at 30. There, the Court did not ask whether the defendant's Sixth Amendment rights were burdened, because it explicitly held that "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." 488 U.S. at 284; *see also id.* at 281 (distinguishing *Geders*).

by the fact that Tennessee courts also require the chief prosecuting witness to testify first for the State if he chooses to remain in the courtroom after other witnesses are sequestered" because "of course . . . the State, through its prosecuting witness[es], does not share the defendant's constitutional right not to take the stand." *Brooks*, 406 U.S. at 611 n.5. It is clear, therefore, that when a defendant testifies, he does not forfeit the rights that the Constitution guarantees him *as a defendant*. Although the prosecution may seek to ensure the reliability of a witness's testimony, when that witness is the defendant, it cannot do so at the expense of his constitutional rights.

The United States attempts to obscure this unremarkable though fundamental rule of law by reference to cases holding that once a defendant takes the stand, he cannot avoid impeachment by relying on his Fifth Amendment right to remain silent. Br. of United States at 14-17. Those cases have no application here. In *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) and *Raffel v. United States*, 271 U.S. 494, 497 (1926), the Court held that once a defendant casts aside the "cloak" of the Fifth Amendment right to remain silent, his pre-trial silence can be used to impeach his credibility as a prior act inconsistent with his decision to testify at trial. Similarly, in *Brown v. United States*, 356 U.S. 148, 155-56 (1958), the Court held that once a defendant takes the stand, she has waived her Fifth Amendment right to silence and cannot invoke that right to evade cross-examination on matters to which she has testified on direct. Collectively, these cases stand for the proposition that once a defendant takes the stand, he waives his Fifth Amendment right to silence and cannot, therefore, continue to invoke its protections. They do not stand for the proposition that once a defendant takes the stand, he waives *all* of his constitutional rights and cannot invoke the protections afforded by *any* of them. Here, Agard exercised his Sixth Amendment right to attend his trial and certainly did not waive it by taking

the stand. The Fifth Amendment cases relied on by the state and its *amici* are thus entirely inapposite.[4]

The prosecutor's invitation to the jury to discredit Agard's testimony constituted a penalty of the most basic sort. Regardless of the fact that Agard testified in his own defense, the prosecutor's comments rendered Agard's assertion of his right to confront the witnesses against him more costly by casting doubt on his testimony—and, therefore, his defense—based on nothing but the fact that Agard exercised the rights to which he was entitled *as a defendant*. And, as explained below, because that penalty was entirely unnecessary, the prosecutor's comments violated Agard's constitutional rights under the Sixth Amendment, made applicable to the states through the Fourteenth Amendment.

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[4]Nor did Agard's counsel "open the door" to the prosecutor's comments as did defense counsel in *United States v. Robinson*, 485 U.S. 25 (1988). *See* Pet. App. 76a; *see also* Br. of United States at 24 n.11; Pet. Br. at 7, 37 n.15, 41-42. In *Robinson*, after the defendant had exercised his Fifth Amendment right not to testify, defense counsel misleadingly argued to the jury on summation that the government had denied defendant an opportunity to explain his version of the relevant events. 485 U.S. at 27-28. This Court held that, as a "fair response," the prosecutor was entitled on summation to inform the jury that defendant could have testified if he wished. *Id.* at 31-34. Significantly, the Court emphasized the fact that the prosecutor's comments did not constitute a penalty because they did not invite the jury to draw an adverse inference. *Id.* at 32. Here, in contrast, the prosecutor pointedly urged the jury to draw an adverse inference from Agard's exercise of his right to be present in the courtroom. J.A. 49. Moreover, by arguing that the prosecution witnesses had fabricated their testimony, Agard's counsel did not in any way "open the door" to the issue of whether Agard himself had used his presence at trial to tailor his testimony to the prosecution's case.

B. The Prosecutor's Comments in Summation Were Not Only Unnecessary To, but Affirmatively Subverted, the Ascertainment of Truth Through the Adversary Process.

To sustain the imposition of this penalty upon Agard's constitutional right to be present at his trial, the state must meet a heavy burden. This Court measures the legitimacy of the challenged governmental practice against the extent to which that practice impairs the policies underlying the right affected. *See, e.g., Jenkins*, 447 U.S. at 236-38. Where, as here, the right at issue is one guaranteed to the accused under the Confrontation Clause, the burden imposed must, as the state recognizes, be "*necessary* to further an important public policy." *See Maryland v. Craig*, 497 U.S. 836, 850 (1990) (emphasis added); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *see* Pet. Br. at 21.[5] The only public policy put forth by the state to defend its prosecutor's comments is the ascertainment of truth through the adversarial process. *See, e.g.*, Pet. Br. at 14, 27, 30. But penalizing a defendant's exercise of his right to be present in the courtroom—particularly where there is no

[5]That the state can cite only one federal case—*Illinois v. Allen*, 397 U.S. 337 (1970)—in which infringement of a defendant's right to be present at trial was deemed constitutional makes clear that infringement of that right is not countenanced except where necessary to avoid extraordinary harm. *See id.* at 338 (holding that defendant may be removed from courtroom where "he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial"). The other two cases cited by the state, *Schmerber v. California*, 384 U.S. 757, 765 (1966) (holding that admission against defendant of nontestimonial evidence obtained from forced blood test did not violate the defendant's Fifth Amendment right against self-incrimination), and *Estelle v. Williams*, 425 U.S. 501, 505-06, 512 (1976) (holding that compelling a defendant to stand trial in his prison uniform violates the Fourteenth Amendment), did not involve the right to be present at trial.

evidence suggesting that the defendant has abused or waived that right—does not further that policy.

The prosecutor's comments here were in no way necessary to promote the ascertainment of the truth. In particular, the prosecutor's comments were made for the first time on summation and were simply a bald-faced attack on Agard's right to be present in the courtroom. *See* Pet. App. 46a. As the Second Circuit emphasized, the prosecutor did not point to any evidence supporting an inference that Agard tailored his testimony upon hearing the testimony of other witnesses; rather, the only support for that inference was Agard's presence at trial. Pet. App. 46a, 68a, 72a.[6] As Judge Winter recognized below, allowing such comment would ensure that in every case in which a testifying defendant exercises his right to be present in the courtroom, the government will have the opportunity to

[6]The state's contention that the prosecutor did provide a factual basis for her accusation of tailoring and that the Second Circuit simply misinterpreted the record is without merit. *See* Pet. Br. at 44-47. The comments that Agard was "slick," J.A. 45, that his testimony sounded "rehearsed," J.A. 48, and that he testified for the first time on cross-examination that Ms. Winder had slapped him during their first encounter, J.A. 48, were attacks on Agard's credibility. *See* Br. of United States at 23-24. Not one of those references, however, suggests that Agard tailored his testimony after hearing the other witnesses testify. Nor is the fact that Agard's testimony corroborated much of the complaining witnesses' testimony but for the denials of the crimes, J.A. 46-47, evidence of tailoring. Finally, the state's characterization of the prosecutor's reference to *defense counsel's* argument about the existence of Ms. Winder's boyfriend "fit[ting] the whole scenario here," J.A. 37, as a reference to evidence of tailoring by *Agard* is a flat misrepresentation of the record. *Compare* J.A. 37 (prosecutor noting that defense counsel "[came] up with the story that he says fits the whole scenario here, that there was a boyfriend involved") *with* Pet. Br. at 46 (arguing that prosecutor referred to "how *defendant's* explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it 'fits the whole scenario here'") (emphasis added).

effect "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial." Pet. App. 72a.[7] The prosecution would be allowed such unfounded bolstering even though prosecutors already have ample alternative means on cross-examination and in summation to challenge a defendant's testimony and credibility. Pet. App. 46a; *see, e.g., Connecticut v. Cassidy*, 672 A.2d 899, 908 (Conn. 1996).[8]

This unsupported bolstering is not only unnecessary to further the truth-seeking function of the trial, but is affirmatively harmful to that goal. In the absence of any facts suggesting tailoring, comments casting suspicion on a defendant's exercise of his constitutional rights "are prejudicial and not at all probative." Pet. App. 46a; *see also Griffin*, 380 U.S. at 613. Such comments are no more probative as to guilty defendants than they are as to innocent defendants: a defendant whose testimony "fits" that of other witnesses because he is innocent is just as likely to suffer an adverse inference as a guilty

[7]Thus, it is the prosecution, and not the defense, that will enjoy a "tactical advantage[]" as a result of, and at the expense of, the defendant's exercise of his rights. *See* Pet. Br. at 23. Because this tactical advantage is gained at the expense of the defendant's constitutional right to be present at trial, it is different in kind from the advantage a prosecutor may gain by referring to the defendant's interest in the outcome of the case. *See* Pet. Br. at 45; Br. of United States at 24. Comment on the defendant's interest in the outcome of the case, sanctioned in *Reagan v. United States*, 157 U.S. 301 (1895), does not trigger the *Griffin* penalty analysis because it does not encourage the jury to draw an adverse inference from the defendant's exercise of a constitutional right.

[8]In her summation, the prosecutor did just that, arguing that Agard's prior statements, his demeanor, his interest in the outcome of the case, and the inconsistency between his recollection and that of certain of the state's witnesses, all cast doubt on his testimony. J.A. 44-46.

defendant whose testimony "fits" because he is in fact tailoring his story based on the testimony he has heard. Put another way, the prosecutor's use of such comments will be equally effective in convicting guilty *and* innocent defendants—directly contrary to the "ultimate objective" of our criminal justice system "that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). *See also United States v. Nobles*, 422 U.S. 225, 230 (1975) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Indeed, such a practice may be even *more* effective against innocent defendants, because a closer "fit," which in many cases would signify innocence rather than guilt, will invariably render a defendant more vulnerable to the prosecutor's attack. Thus, the effect of the practice is "to impede [the search for truth] and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

As such, the practice defended by the state here violates the policies underlying the Confrontation Clause. This Court consistently has recognized that the fundamental policy underlying the Confrontation Clause is to promote the reliability of the evidence and to protect the adversary process by permitting the defendant to hear and challenge the evidence offered against him. *See, e.g., Lilly v. Virginia*, 119 S. Ct. 1887, 1894 (1999) ("[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact") (quoting *Craig*, 497 U.S. at 845); *White v. Illinois*, 502 U.S. 346, 356 (1992) (basic purpose of Confrontation Clause is to promote integrity of factfinding process); *Craig*, 497 U.S. at 846 ("mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining

process in criminal trials") (internal quotation marks and citation omitted); *Coy*, 487 U.S. at 1019-20 (confrontation rights promote fairness and ensure integrity of the factfinding process); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (noting that confrontation right "promotes reliability in criminal trials" and serves as a safeguard "to promote to the greatest possible degree society's interest in having the accused and [the] accuser engage in an open and even contest in a public trial"); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (underlying purpose of Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence").

Prosecutorial comment casting doubt on the defendant's testimony based solely on his presence at trial impairs, rather than promotes, the reliability of the criminal process and its adversary nature. Because the effectiveness of adverse comment on a defendant's presence at trial has no relation (at best) or an inverse relation (at worst) to the defendant's culpability, the inference of tailoring drawn from that comment is, precisely like the comment in *Griffin*, "infused with unreliability." Pet. Br. at 26. Moreover, unlike impeachment of a defendant's testimony upon cross-examination, which "may enhance the reliability of the criminal process" because it "allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts," *Jenkins*, 447 U.S. at 238, generic comments made at the summation stage allow the prosecution to sidestep the adversarial give-and-take, because the defendant has no realistic chance to respond. *See* Pet. App. 40a n.6. *Cf. Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and

fairness").[9]

Finally, asking the jury to draw an adverse inference from the defendant's presence at trial profoundly disturbs the balance of rights and obligations in the adversarial criminal process. In reaffirming *Griffin*, this Court recently emphasized the importance of that balance:

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations *while respecting the defendant's individual rights*.

Mitchell, 119 S. Ct. at 1316 (emphasis added). *See also Oregon v. Hass*, 420 U.S. 714, 722 (1975) (recognizing that "[w]e are, after all, always engaged in a search for truth in a criminal case *so long as the search is surrounded with the safeguards provided by our Constitution*") (emphasis added). To allow the state to "enlist the defendant in [carrying its burden]," *Mitchell*, 119 S. Ct. at 1316, would be to subvert the adversarial balance by transforming a defendant's exercise of constitutionally protected rights into an unfair advantage for the state.

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[9]That the defendant could try to counter the prosecutor's blanket accusation by moving to reopen the case, Pet. App. 65a, Pet. Br. at 36-37, hardly cures the constitutional violation. As the state concedes, Pet. Br. at 36, reopening of the case is within the trial court's discretion; therefore, it is by no means certain that the defendant would be able to take the stand again. Even if he could, there is little or nothing he could say to rebut such a generic claim. In effect, the state would have this Court hold that it is permissible to create a presumption that a testifying defendant who exercises his right to be present at trial has tailored his testimony as long as the defendant may be given a chance to attempt to "rebut" the presumption.

The state's argument that the Second Circuit's holding "skews the level playing field" in favor of the *defendant* is therefore completely untenable. Pet. Br. at 24. Preventing prosecutors from attacking a defendant's credibility on the basis that he exercised his right to be present at trial would not, as the state asserts, permit use of the Sixth Amendment as a "license to commit perjury free from the risk of impeachment designed to detect . . . falsehoods" in his testimony. *Id.* In support of this argument, the state and the United States rely on an array of cases in which a criminal defendant was forbidden to invoke a constitutional right to avoid being cross-examined with *evidence* inconsistent with his trial testimony. Br. of United States at 15-18; Pet. Br. at 20 n.5, 24. *See, e.g., Harris v. New York*, 401 U.S. 222, 224-26 (1971) (defendant impeached on cross-examination with prior inconsistent statements taken in violation of *Miranda* rights); *Walder v. United States*, 347 U.S. 62, 65-66 (1954) (defendant impeached with evidence seized in violation of Fourth Amendment where existence of such evidence disproved defendant's testimony); *see also Jenkins*, 447 U.S. at 238 (defendant impeached on cross-examination with prior inconsistent conduct); *Raffel*, 271 U.S. at 497-98 (same).

These cases turn on the notion that cross-examination helps further the truth-seeking function of the trial because it "allows prosecutors to test the credibility of witnesses *by asking them to explain prior inconsistent statements and acts*." *Jenkins*, 447 U.S. at 238 (emphasis added).[10] But that is not this case. Rather, the narrow issue presented here is whether a prosecutor

[10]*See also Perry*, 488 U.S. at 282-83 (importance of cross-examination outweighed defendant's right to confer with counsel during cross-examination); *Brown*, 356 U.S. at 154-57 (defendant not permitted to invoke Fifth Amendment to evade cross-examination with respect to issues testified to on direct).

may urge the jury to draw an inference adverse to the defendant's credibility "1) for the first time on summation; 2) without facts in evidence to support the inference; [and] 3) in a manner which directly attacks the defendant's right to be present during his entire trial." Pet. App. 46a. Accordingly, cases holding that a defendant may not use a constitutional right as a shield to avoid being cross-examined with *facts* that would reveal the falsity of his testimony are entirely inapposite. As the Court of Appeals explained:

> Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. Such tactics prevent rebuttal and cross-examination, which are the engines of the truth-finding process in an adversarial criminal trial. Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative. They certainly do not provide an important reason for us to cut back on a defendant's exercise of his Sixth Amendment rights.

Pet. App. 46a. None of the cross-examination cases cited by the state and its *amici* is remotely relevant to this issue and none, therefore, compels or even supports reversal of the decision below.

Nor does *United States v. Dunnigan*, 507 U.S. 87, 96-98 (1993) (right to testify not violated by sentence enhancement for perjury), or *Nix v. Whiteside*, 475 U.S. 157, 171-75 (1986) (right to testify and right to counsel not violated where defendant's counsel dissuaded him from offering perjured testimony), support the state's argument. Pet. Br. at 24. In those cases, the trial court made a *factual finding* that the defendant committed perjury, *Dunnigan*, 507 U.S. at 89, 95-96, or intended to commit perjury. *Whiteside*, 475 U.S. at 182 (Blackmun, J., concurring). Similarly unavailing is *United*

States v. Nobles, 422 U.S. 225 (1975). Pet. Br. at 24. In that case, defense counsel sought to impeach the credibility of prosecution witnesses through the testimony of an investigator, but refused to produce the investigator's contemporaneous report concerning the conversations at issue. 422 U.S. at 227-32. The Court held that the trial judge's order precluding the investigator from testifying without disclosing the report did not violate the defendant's rights to compulsory process and cross-examination because the Sixth Amendment does not allow the defendant to escape the "legitimate demands of the adversarial system" by deliberately presenting only half of a witness's knowledge. *Id.* at 241.

While the truth-seeking function of the adversary system legitimately demands that a defendant not commit perjury, not present "half-truths," and not testify "free from the embarrassment of impeachment evidence from the defendant's own mouth," *Hass*, 420 U.S. at 723, that function is not furthered where, as here, the prosecutor reaches beyond "evidence from the defendant's own mouth" to attack the defendant's credibility, for the first time on summation, solely on the basis of his exercise of a constitutional right. The prosecutor's comments here—which were based on nothing more than Agard's presence at his own trial—in no way furthered the truth-seeking function of the adversary process, as the comments were completely divorced from any testing of this particular defendant's guilt or innocence. The state therefore placed a penalty on Agard's constitutional right to confront his accusers without advancing any state interest. This the Constitution forbids.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 9, 1999

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